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Legal Status of Developed Tidelands in the Northeast: A Three-State Sampling

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THE LEGAL STATUS OF DEVELOPED TIDELANDS IN THE NORTHEAST: A THREE-STATE SAMPLING

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The tidelands law of the United States has evolved sporadically. As the nation's population pressures have increased, and every conceivable type of development has attempted to locate in the coastal zone (1), the regulation of tidelands has become increasingly stringent. No longer can a private party fill an acre of tidelands on whim. In the past, however, unauthorized tideland development was a frequent occurrence. Thus current state governments must deal with a legacy of improperly filled tidelands. This paper will examine some of the states' attempts to address the problem of illegally improved tidelands.

OVERVIEW

The unique value of the ocean and its shores have been recognized throughout history, so that different laws have been applied to these areas than to their adjoining uplands. This differential treatment can be traced back to Roman times, where it was held that the rivers, the sea and its shores could not be privately owned (2). In the words of the Institutes of Justinian, these resources were "'common to all'" (3).

With the decline of the Roman Empire came an erosion of the public ownership of tidelands (4). By the Dark Ages, the English Crown claimed private ownership of all shores of seas and navigable rivers within the ebb and flow of the

tide, as well as an exclusive right to fish these areas (5). The King, in turn, granted this right of private ownership and use of the English shores to favored subjects (6).

As these private grants proliferated, the populace protested (7). The public's dissatisfaction with the Crown's absolute power to dispose of river and shore rights was partially responsible for the signing of the Magna Charta by the Crown in 1215 (8). The Magna Charta subsequently was interpreted loosely by courts, forming the basis for the common law theory (9) which divided the Crown's claimed right so as to accommodate the interests of both the King and his subjects in the lands below mean high water (10). Under the theory, the Crown had two kinds of interests in tidelands: a jus privatum, or private ownership interest, and a jus publicum, or public interest (11). The jus publicum provided that the king held the common rights of navigation and fishing in his soverign capacity as a representative of the people in public trust for all his subjects (12). Thus the Crown could not transfer this latter interest into private hands (13). Eventually the theory evolved so as to place the jus publicum under the control of Parliament, while the jus privatum remained with the King (14).

Since neither Parliament nor the King held all rights to the tidelands, neither could convey clear title to such lands to private individuals (15). As a consequence, when

the Crown transferred its jus privatum to other individuals, their interest always remained subject to the jus publicum, the public rights of fishing and navigation (16). Only Parliament, as the public's representative, could convey the jus publicum (17).

In the days of the American colonies, it was inconceivable that there might be insufficient coastline to accommodate everyone. Settlers concentrated on fostering commerce and industry--constructing wharves, docks and piers on tidelands and filling coastal lands as they saw fit (18). Despite the fact that the public held an interest in tidelands, this public trust was often subordinated to private uses by private developers.

Once the former colonies became independent, they succeeded to the tideland rights previously held by the Crown and Parliament (19). The legislature of these states, as the representatives of the public, were endowed with the authority to restrict and regulate the exerise of both the jus privatum and jus publicum (20). The manner in which each state treated its tidelands varied, depending upon its own particular needs. The usual practice was to grant riparian land owners, owners of waterfront property, a preferred right in the adjacent tidelands (21). This right could consist of a license to use the property or even give title to the land, depending on the state. Riparian landowners continued the pre-Revolution process of improving

and filling tidelands as their personal necessities dictated.

As coastal development pressures began to increase, and the value of the coastal zone became apparent, successively more rigorous statutory schemes were enacted by state legislatures to regulate tidelands use (22). Nevertheless, the early laws were not strictly enforced, and unauthorized improvement of tidelands continued.

It was not until the latter half of this century that state regulators really began to become concerned with the illegal filling of, and erection of structures over tidelands (23). The officials were faced with the problem of what to do about tidelands which had been developed without the appropriate state authority. The situation presented a unique conflict between public and private interests. The historic public trust in tidelands was pitted against private landholders who, at times, unwittingly had purchased buildings erected on unlawfully developed tidelands.

The states had a choice. They could retain the status quo by doing nothing. Or they could attempt to identify the improperly filled lands, an enormous task possibly requiring the ascertainment of the state's high tide line in colonial times in order to document claims to property now constituting illegal upland. If the state then discovered improperly developed land, for instance, tidelands which

which now had a house standing upon them, it was presented with a dilemma. The state could allow the house to remain, or it could attempt to return the land to its pre-development status by requiring the removal of the dwelling and subsequent excavation of the land. If the state decided to let the house stand, it could deed the underlying public property to the private party for a price or gratis, lease the property to the party, or do nothing.

Just as the states historically have dealt with the public and private rights in their tidelands differently, the states which have addressed this problem have come up with varing solutions. This paper will examine the treatment given unlawfully improved tidelands in three states along the North Atlantic seaboard: New Jersey, Massachusetts and Maine. Its discussion will be restricted to those improperly developed tidelands which are located between the high and low water lines, concentrating on developments which have been in existence for a substantial length of time.

The Northeast was selected as an area of study because all the coastal states in this region were, at one time, part of the British Empire. Thus these states' interest in tidelands are rooted in the same tradition, making their subsequent treatment of tidelands more comparable than would otherwise be the case. The particular states examined demonstrate a broad range of statutory solutions to illegal

development of long-standing tenure. For instance, New Jersey has elected to assert its claim to filled tidelands, and after identifying the improperly developed lands for which a state grant was never obtained, has decided to sell those developed lands to their present occupants (24). Massachusetts, in contrast, apparently does not plan to sell its affected tidelands, nor has it launched a full-scale effort to identify them. Instead it hopes to locate some of the illegally developed land through a recently enacted amendment to its licensing statute, then assessing these parties the back fees they would have paid if their improvements had been properly licensed (25). Even with the proper authorization, a license to develop in Massachusetts is subject to revocation at any time by the legislature (26). Maine has taken an entirely different approach to improperly filled tidelands, releasing all public interest in tidelands which were filled before 1976 to their "owners" (27).

This paper will analyze each state's tideland law separately (28). The legal status of the state's tidelands will be traced from colonial times. An historical approach is necessary because the tideland law of no two states has evolved identically. The legal heritage of each state, combined with its social and economic development to produce its own unique combination of common and statutory law (29). Care will be taken in examining each state to discuss its

most recent attempts to find a palatable solution to the problem of illegally developed tidelands of long standing. The discussion will conclude with a summary of the current status of developed tidelands in the state.

Once the states have been examined individually, their treatment of illegally improved tidelands will be compared (30). Some uniform considerations involved in resolving tidelands issues will be extracted (31). Recommendations for future state treatment of illegally filled tidelands will be made (32).

Some preliminary definitions of terminolgy is required before embarking on this endeavor, as coastal law is frought with words meaning different things to different people. As used herein, "tidelands" encompasses the lands between the high and low water marks, which are periodically submerged by the tides (33). "Tidal flats" will designate those tidelands between the high and low water marks or one hundred rods (34) from the high water mark, whichever is less. The "one hundred rod lands" refers to those tidelands above the low water mark, but over one hundred rods below high water. "Submerged lands" generally will be used to designate the lands below the low water line which are constantly covered by water, except where specific note is made that the term is meant to include the one hundred rod lands, as well.

LEGAL TREATMENT OF TIDELANDS DEVELOPMENT

New Jersey

Since New Jersey was one of the original thirteen states, its people were vested with all the Crown's rights to New Jersey's tidelands after the American Revolution (35). The attitude of the state towards these lands is best summarized by the court in Bailey v. Driscoll (36). There the New Jersey Superior Court, as affirmed by the New Jersey Supreme Court, held that each state exercises the sovereign perogative of ownership over its own tidelands, and thus may deal with them accordingly to its own views of justice and fairness (37). According to the court, a state may reserve control over its tidelands to itself, or grant these rights to private individuals or corporations, as it deems is in the public's best interests (38).

Prior to 1851, the State of New Jersey exerted no general supervision or control over its tidelands (39). The accepted custom of the state was that an owner of riparian lands could expand his holdings down to the low water mark by making improvements upon the tidally-washed lands adjoining his property (40). Thus if an upland owner built a wharf or filled land adjacent to his property from the high to the low water marks, title to that land became vested in him in fee simple absolute (41). Before any

improvements were made to the tidelands, however, the riparian owner had no property right in this area; he merely held a license to improve which was revocable by the state (42). The Wharf Act of 1851 (43) codified this common law custom (44).

The Wharf Act subsequently was repealed, and the prior local custom terminated as to some of New Jersey's tidelands in 1869 (45), and as to the remainder in 1891 (46). As might be expected, under the language of the repealing statute, riparian landowners who had built wharves or filled tidelands prior to 1869 or 1891, whichever was the relevant date for the area, retained title to the affected property (47). Where this license to artificially appropriate the tidelands had not been exercised, however, it was revoked by the state; these latter tidelands remained the state's property (48).

The repealing statute provided that any future acquisition of, filling in or wharfing out upon tidelands must be authorized by the Riparian Commissioners, who were empowered to lease or grant the tidelands to private parties (49). These commissioners initially were very lax, often selling or leasing tidal flats for inadequate amounts in perpetuity (50). Moreover, riparian landowners continued to fill tidelands without state permission (51). As much of the filling took place in the marshes and meadowlands, areas then thought valueless, state authorities paid little

attention to the status of these lands (52). Much of the unauthorized private development of state land took place in good faith, as it was very hard to determine the location of the mean high tide line separating public and private property (53).

With the growth in population, commerce and navigation, the tidelands became increasingly valuable (54). The limited nature of the tidelands resource, along with citizen interest in ensuring that the state was sufficiently compensated for the private appropriation of these lands (55), combined to increase the stringency of review by the state before leasing or granting tidal lands. New Jersey's statutory requirement, dating from 1894 (56), that any money received from the lease or sale of current or former tidelands must be appropriated for the support of the state's public schools (57), compelled great public interest in the tideland issue. In New Jersey, once money or property has been appropriated to the permanent fund for the support of free public schools, the State Constitution prevents it from being put to any other use (58). Thus the state cannot give away riparian property, even for public purposes (59). While the school funds' principal cannot be used for any purpose, it's interest accrues to support public education (60).

It was not until 1959 that the State of New Jersey made any real effort to bolster the school fund by asserting

claim to the state's marsh and meadowlands (61). Up until this time the tideland doctrine primarily had been used to claim the shores bounding the state's rivers and the ocean (62). While such shores are relatively barren areas where the mean high tide mark is clearly discernible, the marshes and meadowlands are heavily vegetated, low-lying areas often situated far from the water course, with the high tide mark lost among the covering vegetation (63). Nevertheless, by 1961 the Superior Court of New Jersey recognized the state's claim to thousands of acres of marsh and meadowland flowed by the tide (64).

The decision that the state had a valid claim to tidally-affected marsh and meadowlands caused tremendous public concern (65). Citizens who held record title to property in this area were concerned that the court's holding would cloud title to their land, rendering it unmarketable (66). As a consequence, several study commissions were formed to solve the conflict between the states' reclamation efforts and private landowners' claims (67). Their efforts primarily focused on the Hackensack Meadowlands in northern New Jersey, the proposed site of a new sports complex (68).

In addition, various legislative solutions were introduced to address the overall problem (69). Among the proposals were 1964 and 1965 bills that would have exempted from claims of state ownership all record titles held by a

property owner or his predecessor for the previous thirty years which had been assessed taxes for the last twenty (70), and a 1965 bill which proposed that the line separating private and state land be moved from the mean high to the mean low water mark (71). Both types of bills received legislative approval, but never went into effect because of a gubernatorial veto (72). Presumably the veto was due to the constitutional question of whether the legislature could give away lands that were dedicated to the school fund (73).

Consequently, in 1966 (74) and 1968 (75) legislative resolutions proposed putting to a public referendum a constitutional amendment providing for private ownership if a history of record ownership and assessment for taxes was shown. The proposals calling for amendment of the Constitution seemed to solve the constitutional questions raised by the earlier legislative bills. The 1966 and 1968 resolutions met a fate similar to their predecessors, however, so that the amendments were never submitted to the electorate (76). Detractors accused the amendments of being inexcusable "give aways" of New Jersey's tidelands to private interests (77).

One bill offered during the 1968 legislative term with a tidelands orientation was successful, though. Senate Bill 477 was enacted in response to a suggestion made by the New Jersey Supreme Court in a meadowlands dispute that "[a]s a

matter of good housekeeping, the apprppriate officers of the state should do what is feasible to catalogue the states' farflung holdings." (78) That law, which was codified as Title 13 of the New Jersey statutes (79), directed what is now the Tidelands Resource Council of the Department of Environmental Protection (80) "to undertake title studies and survey of meadowlands throughout the State and to determine and certify those lands which it f[inds] are State-owned lands." (81) The "meadowlands" subject to study did not encompass all tidelands, but rather were limited by definition to "those lands now or formerly consisting chiefly of salt water swamps, meadows or marshes." (82) When each meadowlands study was complete, the Council was to publish a map clearly deliniating the lands designated as state-owned (83).

Guidelines concerning which meadowlands were candidates for state claims were given by the case spawning the statutory scheme, O'Neill v. State Highway Department (84). In O'Neill, the Supreme Court of New Jersey held that the state owns all lands which are tide-flowed up to the mean high tide mark (85), as well as those lands formerly tide-flowed where the riparian owner artifically excluded the tide after the repeal of the Wharf Act without a grant from the state (86). Tidelands which had been granted to private parties by the state, as well as lands appropriated by riparian owners pursuant to local custom or the Wharf Act

prior to its revocation in 1891, remained in private hands (87).

In addition to setting forth the criteria for potential state-owned tidelands, the O'Neill court apportioned the burden of proof of establishing the tidal or nontidal character of lands between the state and private entities. The court stated that the party claiming that the tideland status of its property is different from what it presently appears has the burden of showing that the property's status was changed by artificial means (88). Thus if a particular piece of nontidal property was claimed by both the state and a private entity, the state must demonstrate that this property is former tidelands which were artificially appropriated (89).

The maps to be produced under the statutory mandate of Title 13 merely set forth the state's claims, but were not intended to resolve the title question (90). Rather, the enactment was meant to allow persons believing that the status of their meadowlands was inaccurate as mapped to require the Council to review its determination (91). Aggrieved parties also were given the right to initiate a quiet title suit against the state (92).

Although Title 13 mandated the state scrutinize only meadowlands, the State Department of Environmental Protection decided to research all the tidelands in which the state might have an interest (93). This was in part

because the O'Neill decision gave notice to both the state and private occupants of land fronting the ocean and its tributaries of the possibile state interest in these lands (94). In the late 1970's, the state especially began to consider the possibility that owned the increasingly valuable lands around the new Atlantic City casinos (95). In order to avoid the lengthy delays that could be involved if a title dispute were to arise, at least five casino developers paid a total of five and one-half million dollars to the state in "nonrefundable considerations" to ensure that title to their land would remain clear of future state claims (96). In most cases, these potential claims never actually arose (97).

Once the state laid claim to the casino lands, it was obvious that it eventually would have to pursue claims against private homeowners (98). Uncertainty as to the legal ownership of riparian properties was rampant, because if the upland status of the property was created by an impermissible method, the lands might belong to the state (99). Moreover, if a property had been conveyed several times since the improvement of the riparian land, it was nearly impossible for the present owner to discern whether the state could make a bona fide claim to his land (100).

To bring some legislative relief to the riparian homeowners of southern New Jersey and to expedite casino claims, a legislative initiative was introduced in 1981 to

relinquish state claims in any property that had not been tidal within the preceding forty years (101). Because the proposal would bar state claims to former tidelands with a given history, and the proceeds from the sale of these lands had been constitutionally dedicated to the public schools, the legislature believed a constitutional amendment was needed (102).

The amendment applied to both meadowland and nonmeadowland property that was formerly, but not currently, tidally flowed (103). It specifically provided that the state could not claim lands which had not been washed by the tides within a forty year time period unless the state "specifically defined and asserted" its claims to the land within that forty years (104). To allow for the fact that some formerly tidal property would have been filled for more than forty years before the amendment's adoption, the amendment was subsequently revised to allow the state one year from its passage to define and assert state claims to these tidelands (105).

The amendment alone deprived the state of nothing (106). When adopted, the state would own exactly what it did before. The amendment simply required the state to make its claim to former tidelands within a specified period (107). The legislature intended to give the private landowner only the relief of knowing whether the state claimed his property (108). The landowner then could

challenge the decision administratively or judicially (109), or attempt to obtain a grant of the land from the state (110).

The relative merits of the amendment was a subject of heated public debate, with opponents including Governor Byrne and his administration (111). Nevertheless, three-fifths of the legislature agreed to submit the initiative to the people of the state (112). The debate concerning the proposed amendment continued, with some people characterizing the amendment as a "giveaway" (113). Two lawsuits relating to the amendment were filed before the balloting (114). One suit dealt with the wording of the interpretive statement which was to be placed on the ballot with the amendment (115), while the other challenged the amendment's constitutionality and subsequent interpretation (116).

The amendment was adopted by a slight majority of New Jersey citizens on November 3, 1981 (117). Because the amendment allowed the state only one year to "specifically define and assert [its] claim" to former tidelands which had not been tidally flowed within the preceding forty years (118), and all but four of New Jersey's twenty-one counties contained some form of tidelands (119), the time pressures on the state were enormous. How a claim had to be "specifically defined and asserted" was thus important. Since the amendment itself did not define this terminology,

it was left to the state's courts.

The New Jersey Supreme Court ruled in 1983 that all the amendment required for a valid claim was that the state declare its claim in good faith and notify any adversely affected property owner (120). No specific procedure had to be followed (121). As of November 1982, when the one-year grace period for claiming lands not tidally flowed in the past forty years had expired, the court found the state had properly defined and asserted its claim to 150,000 acres of land (122) along the New Jersey coast from New York City to Cape May (123). The state did not meet the requisite standard when it made more generalized claims to 77,000 acres (124) along the Delaware Bay and River from Cape May to Trenton, New Jersey (125). As a result of the court's decision, the state lost any potential claim to areas not tidally flowed since November of 1941 in the Delaware tidal region, a loss characterized as "limited" by the court (126).

Once the constitutional amendment was passed many riparian homeowners felt the dilemma of competing state claims to their land was allowed (127). But with the state's filing of numerous claims along the Atlantic coast, it was clear that they were wrong, and that the ownership of a substantial amount of property was in dispute (128).

Opinions varied as to the potential cost to such homeowners of clearing the title to their land. According

to Save the School Fund, a group opposing the amendment, the average cost of the 226 state grants issued to homeowners between 1971 and 1981 was not prohibitively expensive--$1,685 (129). Another source came up with a similar average, stating that fifty-one percent of these claims were settled for $1,000 or less (130). But the common understanding was that in order for a property owner to rid his title of a state claim, he had to buy a riparian grant from the State of New Jersey, paying the current fair market value of the disputed land plus any improvements thereon (131). Thus if the land in question contained a house, it was believed that the homeowner, in effect, had to repurchase his house at current prices (132). While the cost to some homeowners would be covered by their title insurance policies, many policies excepted state claims from coverage (133). Clear title is mandatory if a riparian owner wants to sell his land, as noone will buy it while a state claim is pending (134).

In order to avoid penalizing persons who bought riparian property never suspecting it was improperly filled, a second initiative was introduced in the legislature in 1982 (135). This initiative proposed balloting on an amendment to the State Constitution which would empower the legislature to pass laws setting the compensation rate that a property owner would have to pay to clear title to his land (136). Under the proposal, the compensation for

riparian lands could be "less than the fair market value of the state's interest, or nominal,"(137) although the state would not be required to accept a reduced price (138). The amendment proposed to allow the legislative scheme to differentiate between properties used for different purposes, i.e. between commercial, municipal and residential properties (139).

The legislature unanimously approved putting the second referendum on the ballot (140). Despite having the support of Governor Kean and his administration, a well as the majority of the state legislators (141), New Jersey voters rejected the proposal by a three to two margin in November of 1982 (142). The defeat was at least partially due to an extensive lobbying effort by Save the School Fund, which claimed that millions of dollars would be lost if the amendment was adopted (143).

After the rejection of the 1982 amendment, the state declared that it would not evict residents on property claimed by the state (144) because it did not want to eject good faith buyers who never realized they were purchasing former tidelands (145). Thus the state has not actively pursued its claims, and could not even if it so desired, since the Department of Environmental Protection has insufficient manpower to follow through on each property claim (146). Homeowners who want to sell their land, however, still must obtain clear title, since it is

unmarketable in its present state (147).

These people can choose one of two ways to clear their title. One possibility is to bring a quiet title action against the state, thus forcing the state to prove its claim to the land. It appears this course of action has a good chance of success, since the state would have the burden of proving the former tidal condition of the land from old records not designed to document riparian claims (148). Moreover, in the past the state has not done well in riparian litigation (149). This option, however, takes a substantial amount of time and money, both of which may be at a premium for a potential seller.

The other alternative is for the homeowner to buy a riparian grant from the state. This has been the preferred method for clearing title to date (150). The homeowner applies for a grant from the Tidelands Resource Board. Although the approval of the Board, the Commissioner of Environmental Protection and the Governer is required for the grant to be made (151), authorization is usually given for good faith purchasers of filled land (152). If the householder successfully shows that he bought his land in good faith before the state asserted its claim, he pays a "nominal fee" for the grant--twenty-five percent of its appraised fair market value (153). Industrial, commercial and municipal riparian owners go through the same procedure (154). Thus it seems that although the 1982 referendum was

defeated, it lives on in the form of reduced prices for riparian grants to "good faith" upland owners.

As for the school fund, on October of 1982 it totalled thirty-eight million dollars (155), with an average annual increase of about two million dollars between 1976 and 1981 being due to the sale and lease of tidelands (156). The size of the fund has been increasing more rapidly since the state's assertion of its tidelands claims (157). Because under the state's constitution the fund's principal can not be touched (158), it seems unlikely that enough time has passed for the interest attributable to recently sold tidelands to make a dent in New Jersey's two billion dollar annual budget for school aid (159).

To summarize the current status of New Jersey tidelands, if a person lives on apparent upland in New Jersey which has not been washed by the tide in the past forty years, nor properly claimed by the state prior to November of 1982 as former tidelands, he owns his property outright (160). If, however, his apparent upland has either been tidally flowed in the past forty years (161), or if not so flowed has been appropriately claimed by the state prior to November of 1982 as former tidelands, the private party will have to resolve the conflicting state claim prior to selling his land (162). If the land a person claims as his is currently washed by the tide, his claim to the property is invalid unless he can show one of two things: either

that his predecessor in title artificially appropriated the land by erecting a structure such as a wharf prior to 1869 or 1891, whichever is the relevant date for the area (163), and such appropriation has continued to this day without an unreasonably long interruption (164); or, that he holds a lease or grant of the land from the state (165).

Massachusetts

Like New Jersey, the colonists of Massachusetts received their rights in tidelands from the English Crown (166). The property of the Crown in the Massachusetts area originally was given to the companies chartered to settle Plymouth and Massachusetts Bay colonies (167). Since the companies received no more interest in tidelands than the Crown held, they could deed their jus privatum in land below mean high water to private parties, but retained the jus publicum in trust for the public (168).

The new Massachusetts Bay Colony had different requirements than the Crown and as early as the 1640's its treatment of tidelands diverged from that of the colony that became New Jersey. The Massachusetts colonists needed to encourage commerce and navigation by building wharves, but did not have the public funds for the endeavor (169). Thus the Colonial Ordinance of 1641-47 was passed to encourage private shorefront development (170). It gave the riparian

owner of lands adjoining tidally affected salt water "propriety" over tidelands to the low water mark or one hundred rods (171), whichever was less (that is, propriety over the tidal flats (172)), provided he did not interfere with navigation (173). The rights given to the riparian owner were subject to the same jus publicum that was in effect when the land was owned by the Crown--the public rights of navigation, fishing and fowling (174). Nevertheless, as long as the riparian owner did not materially interfere with navigation, he could erect structures over, or fill in, tidal flats (175), seemingly extinguishing the public rights in the property (176). Until such action was taken, the riparian ownership was subject to the public rights (177).

When the independent province of Massachusetts was formed, the rights of the trading companies in Massachusetts tidelands passed to the province (178), and subsequently to the Commonwealth of Massachusetts. Riparian owners throughout the commonwealth continued to enjoy the rights given them by the Colonial Ordinance of 1641-47 (179). Wharves sprang up along the waterfront and increasing amounts of tidelands were reclaimed (180). By the early 1800's, the common practice of the commonwealth legislature was to grant wharfing privileges to various companies so they could extend structures over the tidal flats onto submerged lands (181). The development pressures were

especially great in Boston Harbor (182).

By the mid-1800's, investors who had speculated in harbor property attempted to capitalize on their investment by pressuring the legislature to grant the commonwealth's flats to private owners (183). Their lobbying efforts backfired, resulting in the creation of a permanent Board of Harbor Commissioners in 1866, whose approval was required for any proposed development of tidelands (184). In addition, the board was empowered to lease tidelands belonging to the commonwealth (185). Provision was made to require compensation by parties which displaced tidewater by locating any structure below the high water mark or filling the tidal flats (186). The compensation was either in the form of an excavation by the party of a basin elsewhere in the harbor's tidelands to allow an equivalent amount of water to gather as the development had displaced, or payment in lieu of excavation (187). The latter was apparently the more common practice (188). The legislature also declared that any unauthorized development which took place below the high water mark was a public nuisance, and empowered the commonwealth to institute a lawsuit to enjoin or remove the nuisance (189).

In 1869 the legislature declared that all authority or license granted from that day forward to build on, fill in or enclose tidelands was "revocable at any time, at the discretion of the legislature. "(190) This license expired

if not used within five years of its issuance (191). By 1874, the legislature required compensation in addition to the tidewater displacement charge if a private party was granted license to build over or fill in tidelands to which the commonwealth held title (192). Presumably the statute encompassed submerged lands, including the one hundred rod lands (193).

Despite the requirement that one had to obtain a license before developing any tidelands after 1866, unauthorized development continued (194). The status of these filled and altered tidelands was unclear. Although they were deeded from one private party to another, the commonwealth arguably retained an interest in them by virtue of the public trust impressed upon them, especially if they were commonwealth lands for which no compensation was paid.

The title uncertainties peaked in 1979. This was when the Massachusetts Supreme Judicial Court was presented with the question of who owned the land underlying a Boston Harbor wharf which had been erected under the auspices of an 1832 legislative enactment (195). Earlier in the century the court had decided that pre-1869 enactments authorizing development were grants of the land, rather than revocable licenses like their successors (196). In Boston Waterfront Development Corporation v. Commonwealth (197), however, the Supreme Judicial Court determined that, at least as to lands below the historic law waterline, enactments which did not

expressly and unequivocably state that all the public's interest in the lands was transferred, conveyed less than absolute title in the underlying land to private parties (198). Rather, such acts were grants of title "subject to the condition subsequent that it [the land] be used for the public purpose for which it was granted. "(199) The court believed this condition was imposed by virtue of the fact that submerged lands are impressed with a public trust (200).

The general understanding of a grant of title subject to such a condition subsequent is that if the land ever fails to be used for the condition imposed, title to the property reverts back to its original owner (201)--here, the commonwealth (202). A similar condition logically would be imposed on the one hundred rods lands, since like the lands below the low tide line, these tidelands were not subject to subject to the terms of Colonial Ordinance of 1641-47 (203).

The Boston Waterfront Devlopment decision did not alter the status of filled tidal flats: the riparian owners still held these lands subject to the public rights of fishing, fowling and navigation (204), and even those public rights were arguably extinguished if a riparian owner built on his flats so as to completely exclude the public without unreasonably interfering with navigation (205). Nevertheless, the decision raised questions in the minds of many of the purported owners of filled tidelands. Thus

during both its 1980 (206) and 1981 terms the Massachusetts legislature considered bills to clarify the title to filled tidelands in Boston Harbor which were below the primitive high water mark (207).

The 1981 bill provided that no limitation was to be implied, unless expressly stated, in legislative acts or deeds by which the commonwealth purported to create rights in waters and lands below the primitive high water mark in Boston (208). Apparently this provision was designed to legislatively overrule the Boston Waterfront decision (209). The bill also declared that any tidelands lying landward of the "1980 line" (a line drawn on a map of the Boston Harbor area in 1980, landward of which was property that, in the past had been tidal flats (210)) which had been, or in the future would be, filled pursuant to the express language of a commonwealth enactment or grant was for a proper public purpose, and any vestigial interest of the commonwealth in such tidelands was eliminated (211). Thus the legislature basically proposed that if any public interest did remain in the lawfully filled tidal flats, these public rights were eliminated (212). As to land seaward of the 1980 line (which consisted of former submerged lands (213)), the bill provided that the decision as to whether the release of the vestigial rights of the commonwealth would be in the public interest was to be made on a parcel by parcel basis by the Executive Office of Environmental Affairs (214).

Despite receiving a favorable advisory opinion from the Supreme Judicial Court on the bill's constitutionality (215), it was never enacted. Instead, a less radical legislative scheme was passed in December of 1983 to "immediately provide more comprehensive protection to the Massachusetts coastline. "(216) The 1983 law essentially modified tidelands statutes which were already in place. The most noteworthy of the changes is one mandating that any future license for tideland development must authorize a specific use (217).

Prior to the law's passage, a license for tidal development was generic, so that the type of development licensed could change without an update of the license (218). For example, if a person received approval to build a wharf, he subsequently could fill the underlying lands without the knowledge or interference of the commonwealth. Now "any change in use or substantial structural alteration of a licensed stucture or fill," requires that one obtain a new license from the Department of Environmental Quality Engineering (219), regardless of when the original license was issued (220). As a result, the commonwealth will be able to keep track of tidelands uses. If a developer does not comply with the terms of his license, it can be revoked (221).

Another significant change is the inclusion of the terms "commonwealth tidelands" and "private tidelands" in

the tidelands statutes along with their definitions (222). According to the Act, "commonwealth tidelands" refers to both tidelands held by the commonwealth in trust for the public, and tidelands held by some other party which are subject either to an express or an implied condition subsequent that they be used for a public purpose (223)--in other words, the submerged lands, presumably including the one hundred rod lands. "Private tidelands" is defined to include tidelands held by a private party subject to a public easement for navigation, fishing and fowling (224)--seemingly the tidal flats subject to riparian ownership under the Colonial Ordinance. The new enactment provides that in order for a structure or fill to be licensed upon either type of tidelands, it must be necessary to accommodate a water dependent use, unless public hearings are held and certain findings made (225). There is an additional requirement that developments upon commonwealth tidelands, even when furthering a water dependent use, must serve a proper public purpose (226).

By superimposing the most recent legislative treatment of Massachusetts tidelands upon the former law, it seems one can summarize the status of filled and otherwise improved tidelands as follows. Any riparian owner whose predecessor in title erected structures upon or filled his tidal flats prior to 1869 holds complete title to these lands (227). Those whose predecessors developed submerged lands

(including one hundred rod lands) during this time with legislative authorization, but without receiving an express grant of all the commonwealth's rights and interest in the lands obtained, at best, title to the property subject to the condition that the land be used for the public purpose for which it was granted (228). Any license granted after 1868 for the development of any tidelands, be they tidal flats or submerged lands, gives the licensee only a revocable development right (229). This right expires if not exercised within five years, and even if exercised, can be withdrawn by the legislature at any time (230).

Thus riparian owners may have "propriety" in their adjacent tidal flats, but unless the flats were developed before 1868, this entitlement remains subject to the public trust. The public interest seemingly may require that post-1868 development not occur at all, or if it is authorized to take place, that the development later be removed, giving way to the public rights of navigation, fishing and fowling. How title to these flats would be characterized is unclear, as is the title to unlawfully developed flats. Title to submerged lands (including the one hundred rod lands) developed after 1868 remains in the commonwealth, with a license to develop being revocable at any time (231).

As to those tidelands which were unlawfully filled or improved after 1866, the improvements are considered by law

to comprise a public nuisance, and are subject to legal action to enjoin or abate them (232). Practically speaking, however, it is unlikely that the commonwealth will require that long-time illegal improvements be removed (233). To begin with, it is improbable that long-term unlawful development will be discovered, because of the commonwealth's lack of personnel to trace such development (234). If it is detected, it will probably be because the private "owner" changes his use of the tideland, and thus subjects himself to the relicensing requirements of the new law (235). Once the illegal activity is discovered, the worst that is likely to happen is that the developer will be charged past assessments for tidewater displacement, as well as an additional fee for the use of commonwealth lands, if applicable (236).

Maine

Since Maine was part of the Commonwealth of Massachusetts when Massachusetts became a state, it is not surprising that the two state's tidelands law pursued a similar course for a long time. Maine achieved statehood on March 15, 1820, when it separated from Massachusetts (237). Thus the pre-1820 statutory and common law of Maine is identical to that of Massachusetts (238). For instance, the Colonial Ordinance of 1641-47, although never enacted by the

Maine legislature, has been adopted by the Maine courts as part of its common law (239). Hence the rights of the riparian landowner in Maine tidal flats has been characterized as a qualified one--qualified by the public rights of navigation, fishing and fowling (240). As long as the tidelands remain in their natural state, the public has the right to navigate, fish and fowl the overlying waters (241). These public rights are extinguished, however, once the riparian owner encloses or fills in his adjacent flats, as long as he does not unreasonably interfere with navigation (242).

This is not the situation for the one hundred rod lands, though. These tidelands were unaffected by the Colonial Ordinance of 1641-47 (243), and have been generally treated like submerged lands (244). Thus after the American Revolution, the state retained both the jus publicum and jus privatum interests in the one hundred rod lands (245). As a legal matter, they were not subject to private appropriation without state authorization (246).

While the state apparently has never given away or sold any of its submerged lands below the low water mark (247), whether similar activity has taken place with regards to the one hundred rod lands is less clear. It is known, however, that often these lands were filled or built upon by private parties without any conveyance or authorization by the state, as were the nearshore tidal flats and the offshore

submerged lands (248).

Prior to 1876, the riparian owner of tidal flats could erect wharves upon the flats without any governmental involvement, the only limitation being that he could not materially interfere with navigation (249). Legislative license was required, though, to erect fishing wiers on tidelands (250). Then in 1876 the Maine legislature enacted a statute which dealt with the licensing of both wharves and weirs (251). It required a potential developer to obtain a public permit from the town prior to erecting either type of structure on tidelands (252). Once a wharf was erected under a valid license, it could not be ordered removed even if it obstructed navigation (253). Without the license, though, the wharf was an unlawful structure (254). Nevertheless, private individuals often built wharves and piers over these state tidelands after 1876 without the requisite license (255).

Apparently it was not until 1967 that the filling of tidelands was regulated. Prior to this time it was legal for a riparian landowner to fill his adjacent flats under the Colonial Ordinance of 1641-47 (256) without state license. In contrast, since the lands seaward of the flats (the one hundred rod and submerged lands) belong to the state (257), they could not lawfully be filled without state authorization, although they were filled (258).

The Wetlands Control Act of 1967 was passed to protect

the public interest from the consequences of coastal wetland alteration (259). It required a riparian owner to obtain permission from the municipality and the Wetlands Control Board before altering any land subject to tidal action above extreme low water (260). Thus the Act governed the filling of and building upon both flats and one hundred rod lands. Apparently it was believed initially that since it was unlawful to fill submerged lands, no license provision was needed for this area. The provision governing coastal wetlands have been amended a number of times since 1967, so that it now applies to both tidal and subtidal (submerged) lands (261). Permits presently are now granted by either the Board of Environmental Protection or the town (262), with their decision being based upon considerations such as whether the activity will unreasonably interfere with recreation or navigation, or will cause certain detrimental environmental effects (263).

Whether the state's tidal and submerged lands have been developed legally or illegally, the responsible parties generally claimed ownership of the underlying land, as well as the structures above (264). They used and conveyed the lands as if they were their own, without paying any consideration to the state or acknowledging the public's interest in the land (265). Some of the most visible land treated in this manner was the waterfront of the Portland Harbor, a large part of which consists of filled land (266).

In 1975, the Maine legislature decided to reestablish the state's rights to its submerged and tidal lands. Through the Submerged Lands Act of 1975 the legislature authorized the Bureau of Public Lands within the Department of Conservation (267), to lease the state's interest in submerged (268) and intertidal lands (269) to private parties (270). The statute provided for a maximum lease term of thirty years in order to enable these persons to lawfully build upon and fill the lands (271). The legislature allowed for no-cost easements for noncommercial, recreational use by the upland owner, as well as for operations occupying one hundred square feet or less of the state tidelands, facilities relating to fish landing or processing, and federal harbor improvement projects (272). The legislature also granted the owners of all structures actually upon the submerged and intertidal lands on the effective date of the legislation a thirty year no-cost easement to those lands (273). Since the term "intertidal lands", as later defined, coincided exactly with the portion of tidelands subject to appropriation by riparian owners under the Colonial Ordinance of 1641-47 (274), it is questionable whether the state had any rights left to lease in those intertidal lands which already had been filled (275).

The leasing statute did not address the issues of whether the public retained an interest in illegally filled

state lands and who "owned" these lands (276). These concerns were brought into focus when neither the city of Portland nor the Bath Iron Works could figure out from whom to obtain ownership rights in order to develop former tidelands (277). The result was the passage of further legislation in 1981 (278).

The 1981 Act enactment released the state's public trust interest in submerged and intertidal lands filled on or before October 1, 1975 (the effective date of Maine's Submerged Lands Act) to the "owners" of these lands (279), unless they had been filled since 1967 in violation of the Wetlands Act (280). Although "owners" was not defined by the Act, the term apparently refers to the parties who filled the lands, and their successors in interest.

In order to grant away the public's trust interest in former one hundred rod and submerged lands, the legislature had to find the grant to be in the public interest (281). In the first section of the 1981 Act, therefore, the legislature declared that such lands as had been filled prior to the effective date of the Submerged Lands Act were "substantially valueless for trust uses" and could be disposed of without impairing the public trust in the remaining lands (282). The legislature believed that the public would benefit by a clarification of the title status of such filled lands, "thereby permitting [their] full use and development (283).

Prior to the law's enactment, the Maine Supreme Judicial Court rendered an advisory opinion upholding these legislative findings and declaring the statute constitutional (284). The court stated that giving up the public rights in the filled lands was "reasonable for the benefit of the people" as required to withstand constitutional challenge, based upon a unique combination of legislative and judicial findings (285). Besides deciding that the legislature might reach the conclusions stated in the Act (286), the Court found that clearing title to the lands so commercial and other activity could proceed without legal reservation was a "legitimate and important public purpose. "(287)

Since the law would prevent disruption of the state's economy, the court believed the public as a whole was benefited (288). Moreover, the court relied on the legislative finding that municipalities, which depend on the filled lands for part of their tax base, could not afford to lose this source of revenue (289). The legislative conclusion that there was insufficient documentation to determine the former high and low water marks along Maine's coast so as to evidence the state's claims was also important to the court (290). The court declared that the legislature could conclude that a case-by-case resolution of the status of the filled lands would be expensive, time consuming and impractical (291). Although some of the

filled submerged lands might be useful for wharves and other coastal facilities, the court decided the legislature could reasonably conclude that the public's need for the facilities was not substantial enough to justify leaving the title to all of Maine's coastally filled land in limbo (292).

The court believed that equity justified confirming the expectation of private ownership by private parties who had long relied upon their title to the filled lands, and in the municipalities that had taxed those lands (293). Finally, the court noted that by releasing its title to the filled lands, the state had not lost any of its broad authority to regulate their development through zoning and other devices (294).

As might be expected, some people characterized the 1981 enactment as "the greatest giveaway in the state's history," and predict it forecasts the death of public trust law in Maine (295). Despite these doomsdayers, the statute has yet to be challenged, and apparently is achieving its purpose of clearing the clouded title to many former tidally-affected lands.

As matters now stand, anyone who filled tidelands or submerged lands on or before October 1, 1976, or their successor in title, owns the filled land outright, unless they were filled since 1967 without the requisite approval of municipality under the Wetlands Control Act (296). Those

who built wharves or other structures over lands that have remained submerged (that is, one hundred rod lands and seaward) prior to October 1, 1976, or those who filled in violation of the Wetlands Control Act prior to this date have a no-cost easement to use the land which expires in year 2005 (297). After that it seems they will have to negotiate leases for the lands under their structures or fill, if the erections and fill are allowed to remain, as is currently contemplated (298). This lease arrangement distresses some of the affected wharf owners, who claim they have paid taxes on the lands underlying their structures for years, and believe they own the lands (299). As a result of their lease status and its uncertainties, a number of owners are unwilling to expend money for improvements to their facilities (300).

The title of riparian landowners to the tidelands abutting their property beneath wharves and structures seems unaffected by the recent legislation. Since 1975, however, it is apparently impossible to have acquired private title to one hundred rod lands or submerged lands, and perhaps even to tidal flats, by virtue of filling these lands or wharfing out over them (301). Instead, one must obtain a lease to these lands under the Submerged Lands Act before commencing the building or filling activity. As of 1983 the going price for most such leases was three cents a square foot, although the state is empowered to charge a fee based

on the appraised value of the property (302).

COMPARISON OF STATES' LEGAL TREATMENT OF TIDELANDS DEVELOPMENT

It is striking how similar the evolution of tidelands law has been in New Jersey, Massachusetts and Maine. Like social and economic considerations in the Northeast apparently produced like treatment of tidelands.

The progression of tidelands law in these three states can be divided into three stages. In the first stage, private development proliferated without regulation, as the young states attempted to establish a foothold in national and international commerce. During the second stage, the states began to regulate tidelands development, as their major harbors became crowded and difficult to navigate because of enormous private expansion into the states' tidewaters. In the last and current stage, more rigorous tidelands legislation is being introduced, as coastal zone preservation has become increasingly important, and the states are trying to sort out who owns what. Each of these stages will be examined in more detail, with the similarities among, and differences between the state's activities in each stage being compared.

The first stage began in colonial times and continued through the mid-nineteenth century, as riparian owners in all three states appropriated the tidelands adjoining their

uplands for their own private use. In Massachusetts and Maine, the result primarily was achieved by means of a regional colonial enactment (303) which later was integrated into larger common law of the two states (304). In New Jersey the law evolved in the opposite direction. There the common law custom of allowing private tideland expansion was later codified in 1851 (305).

The allowance for the expansion of private claims into tidelands reflected the commercial needs of a growing nation. Money was required to finance waterfront development: such structures as wharves, piers and warehouses (306). What better way to achieve the investment of private capital than to make it attractive by allowing for the private acquisition of land? In Massachusetts and Maine, the area of private appropriation was limited to tidal flats (307), while in New Jersey the riparian owner could develop down to the low water mark (308).

In all three states, private development of the relevant tidelands prior to the mid-1800's gave the developer and his successors a preferential right to those lands. New Jersey citizens who artificially appropriated tidelands prior to 1869 or 1891 received clear title to the lands in perpetuity (309). In Massachusetts and Maine, although the riparian owners' rights in the tidal flats were qualified prior to development by the public rights of fishing, fowling and navigation (310), to the extent that

these flats were filled prior to the imposition of state regulation, it appears that the public trust was extinguished (311). It can be argued that the public rights remain in those flats over which structures were erected, since it still is possible to fish, fowl and navigate the underlying waters.

In New Jersey, where riparian landowners had not improved the adjacent tidelands prior to the imposition of development regulations in 1869 and 1891, the license to gain title by artificially appropriating these lands was revoked (312). Riparian owners in Massachusetts and Maine still retain this right, subject to permitting requirements (313).

Licensing requirements are the hallmark of entry into the second stage of the development of tidelands law. In the three states examined, the second stage spanned the mid-1800's to around the 1960's. Harbor traffic was booming by the mid-nineteenth century (314), and the unregulated expansion of wharves into the harbors impeded commercial traffic. The filling of tidelands further reduced navigable harbor space. Thus all three states instituted a permitting regime: New Jersey's (315) and Massachusett's (316) requirements applied to <u>all</u> tidelands development, while Maine's only applied to the erection of wharves and weirs (317).

In each of the three states either a specialized

board's, or else the town's permission was required before the relevant tideland development could occur. In New Jersey (318) and Massachusetts (319) the licensing process became a potentially profitable venture because of the various fees imposed, although this was not the case in Maine.

The New Jersey approach was to create a group of Riparian Commissioners, which, in addition to licensing tideland development, leased and sold the tidelands which were to be developed to private parties (320). This process began in 1869 in some areas, and in 1891 along the remainder of the coast (321).

In Massachusetts, a similar authorization scheme was instituted in 1866, with the Board of Harbor Commissioners' permission being required before tidelands were improved (322). Subsequent enactments in the 1860's and 1870's made it clear, though, that Massachusetts was not planning on using the New Jersy method of selling its tidelands. Instead, Massachusetts designed a leasing arrangement. Any development license issued after 1869 was made revocable at the instance of the legislature (323), so it was impossible to attain a vested development right. In addition, a fee structure was imposed so that any private party which proposed to displace tidal water in its improvement scheme had to pay a tidewater displacement fee (324). An additional charge was levied if commonwealth tidelands were

being developed (325).

Maine began requiring licenses for wharf and weir erection in 1876 (326). Besides being less comprehensive in its coverage than the New Jersey and Massachusetts enactments, the Maine law required no lease or purchase of the lands underlying the proposed structures prior to 1975, even if state tidelands were involved. The 1975 Submerged Lands Act provided for the lease of lands beneath both existing and proposed tideland developments (327).

Even more interestingly, Maine apparently did not see the need to regulate the filling of its tidelands until 1967 (328), by which time its counterparts had been managing tideland fill for over fifty years. This difference in the treatment of tideland filling perhaps can be attributed to the less industrialized nature of Maine. Whatever the reason, Maine was still achieving the second stage innovations while New Jersey was struggling into the third stage of the tideland law progression.

The third stage was stimulated by the increasing awareness of the unique and irreplaceable qualities of tidelands which began in the 1960's. It is at this stage that there has been substantial digression between the three states' treatment of tideland development. The states are similar in that by this time each has strict permitting requirements which must be complied with before any development can occur below the high water mark

(329)---whether the improvement be the erection of a small residential dock or the filling of acres of tidelands for a condominium complex. And all three states have decided to retain their interest in illegally developed tidelands which are still subject to the tidal flow (330)-- such tidelands as those underlying improperly built wharves. The difference among the states is in their treatment of tidelands filled without the appropriate governmental permission during the second stage of the tideland law progression.

The third phase reached New Jersey first when, in 1959, the state claimed privately developed meadowlands (331). Despite several ensuing proposals to release illegally filled tidelands of long standing to their purported private owners (332), it was not until 1981 that a coherent approach to the tidelands problem evidenced itself. Prior to 1981 the state Department of Environmental Protection unilaterally had embarked upon its own attempt to map all of the state's tidelands under the auspices of a legislative mandate to map New Jersey's meadowlands (333). After the passage of the 1981 constitutional amendment (334) and the promulgation of subsequent court decisions interpreting it (335), it was clear that New Jersey had decided to claim as much of its illegally filled tidelands as it could in a limited period of time (336). The state then would sell those tidelands to their present occupants (337).

Massachusetts, in contrast, continued no-sale policy of its second phase of tideland law development into the third. Although its legislature seriously considered extinguishing the public's interest in illegally filled tidelands, so that purported private owners would hold title in fee simple absolute (338), the legislature instead decided to continue a combined licensing-leasing approach (339). Thus the commonwealth intends to charge for the use of its unlawfully filled tidelands as if they had been lawfully developed (340). Massachusetts has yet clearly to establish the ownership status of either its legally or illegally developed tidelands.

Maine was the only one of the three northeastern states examined which not only considered releasing the state's rights in illegally filled tidelands to their purported private owners, but actually did so (341). It is somewhat surprising that this action has yet to be challenged in Maine's courts, since this approach was sufficiently charged politically for the other two states to reject it. The next section of this paper will discuss such recurrent overtones which arise in balancing the public and private interests in illegally developed tidelands.

RECURRENT THEMES IN TIDELAND DEVELOPMENT LAW

The overriding concern of the three states examined herein when dealing with the tideland ownership issue is

clearing title to the land (342). Now that state tideland claims are being publicized, no potential buyer of tidelands will purchase the property if there is a possible state interest in the land (343). Lack of marketable title results in political activity by the purported private owners, which eventually concludes with legislative action. Thus two of the three states studied, the third being Massachusetts, have clarified the title issue.

The political nature of the decision-making process concerning how to treat illegally developed tidelands is apparent from the raft of tideland proposals the states considered before adopting their current schemes (344). The decision is made more explosive by the inherent conflict which exists between the expectations of private riparian owners and the public rights involved. Often private shorefront owners developed their adjacent tidelands in good faith, without knowledge that a state license was required. And even if the developers themselves did not act in good faith, they frequently sold to unsuspecting buyers who never dreamed they were purchasing illegally filled tidelands (345).

Balanced against these private expectations are the public rights in tidelands which date back to colonial times (346). It seems unjust fair that the public at large should give up its interest in valuable tidelands for the benefit of a fortunately placed few. The public rights are

especially significant now that the amount of publicly held coastal lands has dwindled, and the importance of this tidal buffer between the land and sea and biological breeding ground has been recognized (347).

Nevertheless, it is understandable that the purported private owners of developed tidelands feel prejudiced by virtue of the fact that the states have waited so long to consider asserting their claims against the private landholders. If another private party held legal title to the tidelands instead of the state, the doctrine of adverse possession would operate to extinguish the original owner's right for failure to assert it within a reasonable period of time (348). Adverse possession, and other equitable theories, however, generally do not operate against the state (349), especially where the state is holding the public's interest in trust (350). The general theory is that the price of allowing the state, by inaction, to divest the public of its interest in favor of a private party is too high.

The more intangible public benefits which are lost if the state decided to release its interest in illegally filled tidelands is not all that has to be considered. The monetary issues have to be factored into the decision as well. The financial considerations are especially important in the case of New Jersey, where tideland revenues constitutionally have been dedicated to the support of the

public schools since 1844 (351). If New Jersey legislators and its citizenry had approved the proposed constitutional amendment extinguishing all of the state's interest in illegally filled tidelands of long standing (352), the school fund would have lost a substantial chunk of money. Since no state grants would have been required to clear title to these lands, no purchase monies would have been forthcoming.

Whether the State of New Jersey, on balance, has gained or lost money by deciding to claim title to its filled tidelands in unclear. It must have been very costly to map the state's possibly filled tidelands, publish the results of the study (353), as well as now process grant applications and litigate contested claims (354). One wonders whether the state might not be taking money out of the Department of Environmental Protection's pocket and putting it in the public school fund's pocket. Even New Jersey has limits on the revenues it can spend on tideland claims, as is evidenced by its decision not to pursue claims against private landholders unconcerned with clearing the title to their property (355).

The costs of asserting the state's claims to unlawfully filled tidelands also played a major role in the development of tideland strategy in Massachusetts and Maine. Although Massachusetts has not resolved its tideland issue totally, it has decided not to pursue its claims against already

existing illegal tideland development (356). Instead, it will wait for the developers to come to the state under its new permitting procedure (357).

In Maine, the balancing of monetary costs and benefits was even more evident than in New Jersy or Massachusetts. Thus Maine's highest court declared that its legislature "reasonably could conclude that case-by-case resolution of the existing problem--whether by legislative, administrative, or judicial action--would be costly, time-consuming, and ineffective" (358), especially taking into account the fact that the municipalities who have relied on the filled lands as part of their tax base "can ill afford to lose, or be thrown into extended litigation over, those established sources of revenue." (359)

Although Maine and New Jersey decided to resolve their tideland problems in apparently opposite fashions, with Maine releasing its public rights and New Jersey asserting its public rights, both approaches were characterized by their opponents as "giveaways." (360). This criticism was levied because neither state chose to assert its rights to illegally filled tidelands in perpetuity, without recourse for the purported private owner. Massachusetts has avoided this condemnation, probably because it has yet to reach a final decision as to who owns its improperly filled tidelands. The reasonableness of this Massachusetts approach, when compared with the conclusiveness of New

Jersey's and Maine's tidelands treatment will be discused in the next section.

RECOMMENDATIONS FOR STATUTORY TREATMENT OF TIDELAND DEVELOPMENT

From the foregoing study of the statutory schemes in the three states there apparently is little question that these states have retained (361), and should continue to retain, their interest in those tidelands still subject to the tidal flow, whether or not the tidelands support privately-erected structures. Anyone buying a private structure located upon these lands is on notice that the underlying property consists of tidelands, and therefore is possibly subject to state claims.

More worthy of examination is the best statutory approach to the ownership of illegally filled tidelands. Two prerequisites of an ideal scheme are that it conclusively establishes ownership rights in the tidelands, and that it attains a balance between the expectations of private holders of illegally filled tidelands and the public's interest.

The enactment which comports most fully with both of these requirements is New Jersey's tideland law. New Jersey's statutory scheme reaffirms the state's interest in illegally filled tidelands, while allowing private "owners" an opportunity to obtain clear title to their filled tidelands (362). Moreover, the New Jersey legislation was

the subject of a voter referendum (363), a must even for a nonconstitutional issue because of the magnitude of the public interest at stake.

New Jersey's tideland approach can be improved upon, however. For instance, the rate of compensation a private party must pay to extinguish the state's interest in "his" land should be mandated by legislative enactment in order to ensure evenhanded treatment of all riparian owners (364). Moreover, a special expedited and inexpensive appeals process should be established for tideland claims so private parties can contest the designation of their lands in a rapid and inexpensive hearing (365). The appeals process should not be so onerous that it is cheaper and easier to pay the state to clear one's title than to contest the property's designation. The ensuing discussion will explore the ramifications of this proposal for the disposition of illegally filled tidelands.

Since one of the primary factors responsible for the enactment of statutes to untangle tideland ownership status is to clarify title claims, an important requirement for a successful scheme is that it conclusively address the ownership issue. The New Jersey and Maine legislation clearly resolves this question, but the Massachusetts legislation enacted to date lacks the predictable quality (366).

While the leasing approach of the Massachusetts

legislation is initially appealing because it does not alienate the lands from the public, a leasing scheme without a resolution of the title issue does not resolve anything. All it does is postpone until the end of the lease term the inevitable decision of what to do regarding tidelands title.

The alternatives to leasing are to give or sell the tidelands to their purported private owners, or eject the current private landholders in favor of the state. The last choice is overly harsh, as it ignores the fact that most private owners do not know they hold illegally filled tidelands (367). Moreover the approach would enrich the state unjustly through the acquisition of overlying land and buildings for which it did not pay, a major consideration since some of the prime downtown real estate in such port cities as Boston and Portland consist of illegally filled tidelands (368). Finally, the public interest which the state is supposedly protecting has been extinguished in these lands, at least in the traditional sense. No navigation, fishing or waterfowling can take place on filled tidelands.

Extinguishing the public interest in illegally filled tidelands without any compensation to the state swings too far towards the opposite extreme. Using an approach similar to Maine's results in marginal public benefits at best: clear title for a relatively few landholders, continued tax revenues to municipalities, and savings in time and money

since the state's claims do not have to be identifiied (369). Private landholders stand to reap the greatest benefit under such a scheme, gaining clear title, while the public loses an invaluable, although certainly altered, resource without any recompense. The maintenance-of-town-tax-revenues arguement hardly seems a convincing reason for giving away state lands. As for the fact that the identification of state claims is an expensive and time-consuming process, this is a given. Nevertheless, it is a task that is necessary for any comprehensive coastal resource management scheme. Lack of past enforcement of tidelands law is no excuse for giving up current tideland claims. In making the choice to identify these lands, however, the cost of the project should be acknowledged.

The only option left is the New Jersey approach: to assert the state's tideland claims, allowing good faith landholders to purchase grants from the state if it is determined that their land consists of unlawfully filled tidelands (370). No time limit should be set on the mapping process as long as the affected tidelands are identified within a reasonable time. There is no need to impose New Jersey's referendum-inspired artificial cutoff upon an idealized statute (371).

A presumption should be established that unless it can be shown that a private property holder filled the tidelands he claims himself, or that the tidelands were filled within

the past ten to fifteen years by someone else, he is a "good faith" landholder (372). This designation will entitle the landholder to obtain clear title to his illegally filled tidelands at a legislatively mandated percentage of the property's fair market value, not taking into account any privately-erected improvements thereon. The state will be required to convey title to him at the mandated price in order to facilitate similar treatment of persons in like situations. If, however, a private party is not a "good faith" landholder, the state will have the option of whether to sell him a grant, and if so, at what price.

Any money from the state tideland grants will go into the state coffers, thus benefiting the public at least marginally and offsetting the costs of asserting state claims. Thus the public will be compensated somewhat for the alienation of its interest, while good faith landholders will not be taxed excessively.

It may be desirable to impose a time limit within which a private landholder has to clear title to his property, after which full title will be held by the state. As a result, at some point in time, the title issue will be completely resolved. The period allowed the property holder to obtain a grant should be relatively long, e.g. seventy-five years, so that he has sufficient time to raise any portion of the purchase price he lacks.

In addition, an expedited, inexpensive hearing or

appeals process should be established so that landholders can challenge the designation of their property as illegally filled tidelands. This process might avoid the incongruous results of the New Jersey scheme, where apparently it is cheaper and easier to pay the state to clear a potentially clouded title than to challenge a questionable state claim (373). Abuse of the hearing process can be avoided by allowing for the assessment of the state's court costs and attorney fees against a private challenger if the hearings officer determines the private party brought a frivolous claim.

Finally, because of the widespread effect any decision by the state to give away, sell or retain illegally filled tidelands in which the state may have an interest, any proposal for these lands should be put before the electorate for vote. The ramifications of disposing of the state's tideland interests are too great to leave this issue to legislators subject to partisan influence.

CONCLUSION

It is obvious that the three northeastern states investigated in this study have decided on different statutory treatments of illegally filled tidelands. There is no one correct resolution of the tidelands issue, although an idealized approach has been set forth in this paper. Rather, each state must balance the competing public

and private interests in the state's tidelands, after taking into account the state's own historic treatment of tidelands. Then the state can determine its own best solution to the issues raised by illegally developed tidelands.

ENDNOTES

(1) For an excellent volume addressing the problems of the coastal zone, see The Water's Edge: Critical Problems of the Coastal Zone (B. Ketchum ed. 1972) (hereinafter cited as The Water's Edge).

(2) Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale L.J. 762, 764 (hereinafter cited as note, The Public Trust in Tidal Areas) (citing Code Just. 2.1.1-.1.6).

(3) Code Just. 2.1.1 (quoted in Note, The Public Trust in Tidal Areas, supra note 2, at 763).

(4) Note, The Public Trust in Tidal Areas, supra note 2, at 764-65.

(5) Id. For an exhaustive analysis of the evolution of English public water rights from the Middle Ages through the American Revolution, see Note, State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey, 25 Rutgers L. Rev. 571, 576-615 (1971) (hereinafter cited as Note, State Citizen Rights)

(6) Note, The Public Trust in Tidal Areas, supra note 2, at 765.

(7) Id.

(8) Id. at 765-66.

(9) Id. at 765-68.

(10) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 632, 393 N.E. 2d 356 (1979).

(11) Shively v. Bowlby, 152 U.S. 1, 11-14 (1894).

(12) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 632, 393 N.E.2d 356 (1979).

(13) Id..

(14) Id.

(15) Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

(16) Shively v. Bowlby, 152 U.S. 1, 11-13 (1984).

(17) Opinion of the Justices, 437 A.2d 597, 605 (Me. 1981).

(18) See, e.g., 2 School of Law, University of Maine and Office of Sea Grant Programs, National Science Foundation, Maine Law Affecting Marine Resources: State, Public, and Private Rights, Privileges and Powers 190-91 (1970) (hereinafter cited as University of Maine).

(19) Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410-11, 416-17 (1842).

(20) Appleby v. City of New York, 271 U.S. 364, 382-83 (1926).

(21) See The Water's Edge, supra note 1, at 319.

(22) See, e.g., infra text accompanying notes 303-41.

(23) See, e.g., infra text accompanying notes 324-41.

(24) See infra notes 93-95, 120-23 and 144-54 and accompanying text.

(25) See infra notes 232-36 and accompanying text.

(26) See infra notes 229-230 and accompanying text.

(27) See infra notes 280 and 296 and accompanying text.

(28) See infra notes 35-302 and accompanying text.

(29) See University of Maine, supra note 18, at 186-87.

(30) See infra text accompanying notes 303-41.

(31) See infra text accompanying notes 342-55.

(32) See infra text accompanying notes 356-73.

(33) Accord Webster's New World Dictionary 1486 (1976).

(34) One rod is the equivalent of five and one-half yards. Id. at 1688.

(35) See Arnold v. Mundy, 6 N.J.L. 1, 94 (1821).

(36) 34 N.J. Super. 228, 112 A.2d 3, aff'd in part, rev'd in part on other grounds, 19 N.J. 363, 117 A.2d 265 (1955).

(37) Id. at 13.

(38) Id.

(39) Matthew v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, 362 n.5 (1984). Through the 1860's, the legislature granted corporate charters that included authority "to occupy, possess and enjoy tide flowed lands," and at times made direct grants of tidelands. Id.

(40) Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265, 268 (1965).

(41) See Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265, 268 (1965); Ross v. Mayor and Council of Borough of Edgewater, 115 N.J.L. 477, 484, 180 A. 866 (Sup. Ct.

1935), aff'd, 116 N.J.L. 447, 184 A. 810, cert. denied, 299 U.S. 543 (1936).

(42) Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265, 268 (1965); Stevens v. Paterson and Newport R.R. Co., 34 N.J.L. 532, 546 (1870).

(43) P.L. 1865, p. 335.

(44) O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 10 (1967); Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265, 268 (1965). Section one of the Wharf Act provided that:

> it shall be lawful for the owners of land situated along or on tide waters to build docks or wharfs on the shore in front of his lands, and in any other way to improve the same, and when so built on or improved, to appropriate the same to his own exclusive use.

Leonard v. State Highway Dep't, 24 N.J. Super. 376, 94 A.2d 530, 532-33, aff'd, 29 N.J. Super. 188, 102 A.2d 97 (App. Div. 1953) (P. L. 1851, p. 335). Section eleven defined "shore" as the land between ordinary high and low tide. Id.

(45) Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, 362 N.J. (1984); O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 10 (1967) (both citing P.L. 1869, c. 383, sec. 3, p. 1018). The tidelands involved were the Hudson River, New York Bay and Kill von Kull. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, 362 n.5 (1984).

(46) Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, 362 n.5 (1984); O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 10 (1967) (both citing P.L. 1891, c. 124, sec. 3, p. 216 (codified as amended at N.J. Stat. Ann. sec. 12: 3-4 (West 1979)). The repealing statute expressly stated that it did not revive any local common law N.J. Stat. Annot. sec. 12: 3-4 (West 1979).

(47) O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 10 (1967); N.J. Stat. Ann. sec. 12: 3-4 (West

1979). The statute also provided that any power given corporations to buy, fill or erect wharves upon tidelands or any grants of underwater land were not repealed. Id.

(48) O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 10 (1967); N.J. Stat. Ann. sec. 12:3-4 (West 1979).

(49) Seacoast Real Estate Co. v. American Timber Co., 92 N.J. Eq. 219, 113 A. 489, 490 (1920) (citing P.L. 1891, p.216). This power since has passed to the New Jersey Department of Environmental Protection. See N.J. Stat. Ann. sec. 12: 3-4 (West 1979), as modified by the reorganization of state government reflected in id. at sec. 13: 1D-1.

(50) Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, 362 n.5 (1984).

(51) See O'Neill v. State Highway Dep't,. 50 N.J. 307, 235 A.2d 1, 11 (1967); Dickinson v. Fund for the Support of Free Public Schools, 187 N.J. Super. 224, 454 A.2d 491, 493 (1982), rev'd, 95 N.J. 65, 469 A.2d 1 (1983) (hereinafter cited as Dickinson I).

(52) O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 11 (1967).

(53) Dickinson I, supra note 51, 454 A.2d at 493. Properties that were once tidally flowed and considered valueless when initially filled include the Hackensack Meadowlands, where the Meadowlands Sport Complex currently is located, and Atlantic City property where casinos presently stand. See infra notes 68 and 95 and accompanying text.

(54) Moreover, the public increasingly was concerned that the state receive compensation for any tidelands put to private use, since any rents or purchase monies received from the riparian lands are used to support the public schools. See infra notes 56-58 and accompanying text.

(55) One current activist is Farleigh Dickinson, Jr., who leads the Save the School Fund Committee in its battle to assure that state tidelands are not given away. See, e.g.,

Dickinson v. Fund for the Support of Free Public Schools, 187 N.J. Super. 320, 454 A.2d 480 (Law Div.), rev'd, 187 N.J. Super. 224, 454 A.2d 491 (App. Div. 1982), rev'd, 95 N.J. 65, 469 A.2d 1 (1983). Because money from the lease and sale of these lands is placed into a fund to support public schools, he is afraid that "'[w]e will, inadvertently, sell the next generation of school children down the river.'" Moore, Water, Water Everywhere, N.J. Monthly, Nov. 1982, at 76 (quoting Farleigh Dickinson, Jr., Chairman of Save the School Fund Committee). For a discussion of the school fund, see infra notes 56-60 and accompanying text.

(56) O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 8 (1967) (citing P. L. 1894, c. 71, p.123).

(57) N.J. Stat. Ann. sec. 18A: 56-5 to -6 (West 1968 and Supp. 1983-1984); Dickinson v. Fund for the Support of Free Public Schools, 95 N.J. 65, 469 A.2d 1, 11 (1983) (hereinafter cited as Dickinson II).

(58) Dickinson II, supra note 57, 469 A.2d at 11; N.J. Const. of 1947 art. VIII, sec. iv, para. 2. The Constitution of 1844, art. IV, sec. vii, para. 6, had a similar provision. O'Neill v. State Highway Dep't, 50 N.J. 307, 235 A.2d 1, 8 (1967).

(59) Garrett v. State, 118 N.J. Super. 594, 289 A.2d 542, 545 (1972).

(60) N.J. Const. of 1947 art. VIII, sec. iv, para. 2. As of 1982, the interest from the fund constituted only several million of New Jersey's annual two billion dollar budget for school aid. N.Y. Times, Oct. 24, 1982, sec. 11, at 1, col. 3.

(61) Porro and Teleky, Marshland Title Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323, 325 and n.8 (1972) (citing Sissleman v. State Highway Dep't, No. A 769-59 (N.J. Super. Ct. App. Div., May 1, 1961)).

(62) Porro and Teleky, (supra note 61, at 325.)

(63) See id.

(64) Dickinson I, supra note 51, 454 A.2d at 508 (Michels, J., dissenting) (citing Sissleman v. State Highway Dep't, No. A 769-59 (N.J. Super. Ct. App. Div., May 1, 1964).

(65) Dickinson I, supra note 51, 454 A.2d at 509 (Michels, J, dissenting).

(66) See id., Porro, Meadowlands Owners' Dilemma (pt. 1), N.J. St. B.J. Fall 1967, at 15, 15.

(67) See Porro, The Jersey Meadows: Who Owns Them? Who to Control Them?, 1968 N.J. St. B.J. 143, 143 (hereinafter cited as Porro, The Jersey Meadows). Among these commissions were the Meadowlands Regional Development Agency, an organization of thirteen municipalities formed in 1959, and the Commission to Study Meadowland Development, a group appointed by the 1963 Legislature. Id.

(68) Id.

(69) See Dickinson I, supra note 51, 454 A.2d at 509 (Michels, J., dissenting); Porro, Meadowlands Owners' Dilemma (pt. 1), supra 66, at 16; Porro, The Jersey Meadows, supra note 67, at 143, 173-74.

(70) Porro, Meadowlands Owners' Dilemma (pt. 1), supra note 66, at 16.

(71) Porro, The Jersey Meadows, supra note 67, at 143.

(72) Id.

(73) See id.

(74) Porro, Meadowlands Owners' Dilemma (pt. 1), supra note 66, at 16. A state senate concurrent resolution proposed a constitutional amendment providing that the state have no title to tidal lands where a continuous line of record title to the land could be established for the past thirty years and where taxes had been assessed on it for the past twenty. Id.

(75) Porro, The Jersey Meadows, supra note 67, at 173-74. The constitutional amendment suggested by Senate Concurrent Resolution 41 allowed for private ownership of tidal lands where a person could establish a continuous line of record title to the property since 1891 and that taxes had been assessed on the land for the past twenty years. Id.

(76) See Dickinson I, supra note 51, 454 A.2d at 509 (Michels, J., dissenting); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 482 n.36 (1970). Governer Hughes filed suit to stop balloting on the 1968 amendment, with the result being a removal of the question from the ballot. Id.

(77) Sax, supra note 76, at 482 n.36; Note, State Citizen Rights, supra note 5, at 572 and n.7.

(78) Dickinson II, supra note 57, at 5 (quoting O'Neill v. State Highway Dep't, 50 N.J. 307, 320, 235 A.2d 1, 8 (1967)).

(79) Dickinson II, supra note 57, 469 A.2d at 5; Dickinson I, supra note 51, 454 A.2d at 509 (Michels, J., dissenting) (both citing N.J. Stat. Ann. secs. 13:1B-13.1 to -13.6).

(80) A reorganization of the state government resulted in the Tidelands Resource Council succeeding the Natural Resources Council, N.J. Stat. Ann. sec. 13:1D-3 (West Supp. 1983-1984), which itself was a successor of the Resource Development Council. Id. (West 1979). The Department of Environmental Protection was the offspring of the Department of Conservation and Economic Development. Id. at sec. 13:1D-1 (West 1979).

(81) Id. at sec. 13:1B-13.2 (West 1979).

(82) Id. at sec. 13:1B-13.1(a). See Dickinson II, supra note 57, 469 A.2d at 6; Porro, The Three Faces of O'Neill, N.J. St. B.J., Winter 1968, at 55, 81.

(83) N.J. Stat. Ann. sec. 13:1B-13.4 (West Supp. 1984-1985).

(84) 50 N. J. 307, 235 A. 2d 1 (1967).

(85) Id. at 323, 235 A. 2d at 9. In determining the mean high tide mark, the court believed that the average of all high tides over 18. 6 years should be used, if possible. Id. at 234, 235 A. 2d at 9-10.

(86) Id., 235 A. 2d at 10. For a discussion of the Wharf Act, and the local custom which it codified, see supra notes 39-44 and accompanying text.

(87) 50 N. J. 307, 235 A. 2d at 10.

(88) Id. The state generally has no claim to tidal lands that become upland by natural accretion or reliction; such lands belong to the abutting riparian owner. See Borough of Wildwood Crest v. Masciarella, 51 N. J. 352, 240 A. 2d 655, 677-68 (1968).

(89) See O'Neill, 50 N. J. 307, 235 A. 2d at 11.

(90) City of Newark v. Natural Resources Council, 82 N. J. 530, 414 A. 2d 1304, 1310 (1980).

(91) N. J. Stat. Ann. sec.. 13: 1B-13. 5 (West 1979).

(92) Id.

(93) Dickinson II, supra note 57, 469 A. 2d at 6 (citing N. J. Dept. of Envtl. Protection Admin. Order No. 34 (July 26, 1973)).

(94) Dickinson II, supra note 57, 469 A. 2d at 6.

(95) Wall St. J., Oct. 11, 1982, at 23.

(96) Duffy, Rights and Wrongs, N. J. Monthly, Nov. 1982, at 73, 97.

(97) Id. For instance Playboy Enterprises, Inc. paid

the state a nonrefundable $694,000 over one disputed acre of land, and agreed to pay a total of $4.6 million if the state suported its claim in court. Wall St. J., Oct. 11, 1982, at 23. The state never made a claim, but as provided in the agreement, retained the $694,000. Id.

(98) Moore, supra note 55, at 76.

(99) Dickinson II, supra note 57, 469 A.2d at 6.

(100) Dickinson I, supra note 51, 454 A.2d at 494.

(101) Moore, supra note 55, at 76.

(102) Dickinson I, supra note 51, 454 A.2d at 496.

(103) Dickinson II, supra note 57, 469 A.2d at 7.

(104) Id., 469 A.2d at 3, 7 (quoting N.J. Const. of 1947 art. VIII, sec. v, para. 1, as amended Nov. 3, 1981). The language of the amendment, in full, is as follows:

> No lands that were formerly tidal flowed, but which have not been tidal flowed at any time for a period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good and sufficient bar to any such claim, unless during that period the State has specifically defined and asserted such a claim pursuant to law. This section shall apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the State within 1 year of the adoption of this admendment.

N.J. Const. of 1947 art. VIII, sec. v, para. 1, as amended Nov. 3, 1981).

(105) Dickinson II, supra note 57, 469 A.2d at 3, 7

(citing N.J. Const. of 1947 art. VIII, sec. v, para. 1, as amended Nov. 3, 1981). In an attempt to generate the state governer's support, the original amendment was revised to allow for the one year grace period. Moore, supra note 55, at 76.

(106) Dickinson II, supra note 57, 469 A.2d at 6-7.

(107) Id.

(108) Dickinson I, supra note 51, 454 A.2d at 495.

(109) See id. Since N.J. Stat. Ann. sec. 13: 1B-13.5 (West 1979), allowing for administrative and judicial review of state tideland claims, was promulgated solely for the meadowlands, it may not be applicable to other tidelands. See Dickinson II, supra note 57, 469 A.2d at 6; LeCompte v. State, 128 N.J. Super. 552, 320 A.2d 876, 881 (1974). After O'Neill, however, it is clear that an upland owner can institute a quiet title suit against the state without specific statutory authority. See 235 A.2d at 5.

(110) N.J. Stat. Ann. sec. 12: 3-4 (West 1979), as modified by the reorganization of state governemnt reflected in id. at sec. 13: 1D-1.

(111) Dickinson II, supra note 57, 469 A.2d at 7; Wall St. J., Oct. 11, 1982, at 23, 30.

(112) Dickinson II, supra note 57, 469 A.2d at 7.

(113) Dickinson I, supra note 51, 454 A.2d at 496. Some people believed that the amendment would give away a priceless asset of the state and its educational system, as well as jeopardize the credit rating of school bonds secured by monies received from riparian grants and leases. Wall St. J., Oct. 11, 1982, at 23, 30. Environmetalists who opposed the amendment thought the constitutional changes would threaten the management of tideland development. Id.

(114) Dickinson I, supra note 51, 454 A.2d at 496.

(115) Gormley v. Han, 88 N.J. 26, 438 A.2d 519 (1981). The Supreme Court held the interpretive statement worded by the Attorney General was unfair, and suggested a different statement for use. Id.

(116) Dickinson v Fund for the Support of Free Public Schools, 187 N.J. Super. 320, 454 A.2d 480 (Law Div.), rev'd, 187 N.J. Super. 224, A.2d 491 (App. Div. 1982), rev'd, 95 N.J. 65, 469 A.2d 1 (1983).

(117) Dickinson I, supra note 51, 454 A.2d at 496. The vote was 864,445 for, and 756,220 against approval. Id.

(118) N.J. Const. of 1947 art. VIII, sec. v, para. 1, as amended Nov. 3, 1981.

(119) Wall St. J., Oct. 11, 1982, at 23. About thirty percent of the state's area was being investigated for potential claims. Id.

(120) Dickinson II, supra note 57, 469 A.2d at 9.

(121) See id. at 8.

(122) N.Y. Times, Oct. 23, at 29, 30.

(123) Dickinson II, supra note 57, 469 A.2d at 10-11. The state utilized the mapping procedure it had been required to use when making meadowlands claims in asserting all of its valid tideland claims. Id. at 8. It thus met the specific deliniation requirement of the amendment by designating the places where the tide had flowed on more generalized maps of the areas investigated for tidal claims. Id. at 11. The assertion requirement was met by filing the maps bearing tidal designations with the Secretary of State and county and municipal clerks. Id.

(124) N.Y. Times, Oct. 23, 1982, at 29, 30.

(125) Dickinson II, supra note 57, 469 A.2d at 10-11. The state did not meet the specific deliniation requirement for the Delaware tidal region when it submitted maps of areas suspected of possibly containing tidelands, without

designating a line of tidal flow. Id. Nor did the state really believe it had met the amendment's mandate in filing these maps, according to the trial testimony of both the Attorney General and the chairman of the Tidelands Resource Council. Id. at 10.

(126) Id. at 14.

(127) See Moore, supra note 55, at 76.

(128) See id.

(129) Wall St. J., Oct. 11, 1982, at 23, 30.

(130) Editorial, N.Y. Times, Oct. 30, 1982, at 26, col. 1. According to a New York Times editorial, 224 claims were settled during the ten year span, with the average cost to the homeowner being $1,722. Id.

(131) N.Y. Times, Nov. 7, 1982, at 53, col. 1; N.Y. Times, Oct. 24, 1982, sec. 11, at 1. This view probably stemmed from a New Jersey appellate court decision which held that the compensation a riparian owner should pay for a tidelands grant was the fair market value of the property. See LeCompte v. State, 128 N.J. Super. 552, 320 A.2d 876, 881 (1974). In LeCompte, a riparian owner who had filled tidelands while his grant application was pending was charged the fair market value of the tideland property at the time of conveyance. Id. at 878, 881. Since he had already improved lands at the time of the conveyance, having filled them in, subdivided them, installed water lines, sewer systems and roads, he was charged the fair market value of the property in its improved state. Id.

(132) See Moore, supra note 55, at 76; N.Y. Times, Nov. 7, 1982, at 53, col. 1; N.Y. Times, Oct. 23, 1982, at 29, col. 5.

(133) Wall St. J., Oct. 11, 1982, at 23, 30. Contra Editorial, N.Y. Times, Oct. 30, 1982, at 26, col. 1.

(134) Duffy, supra note 96, at 95. See Wall St. J., Oct. 11, 1982, at 23.

(135) Moore, supra note 55, at 76; N.Y. Times, Nov. 7, 1982, at 53, col. 1.

(136) N.Y. Times, Oct. 24, 1982, sec. 11, at 1. The proposed amendment would have added a second paragraph to the New Jersey Constitution of 1947 art VIII, sec. v. See N.J. Stat. Ann. Const. art VIII, sec. v, annot. 2 (West Supp 1983-1984).

(137) N.Y. Times, Oct. 24, 1982, sec. 11, at 1.

(138) Moore, supra note 55, at 76.

(139) Id.; N.Y. Times, Oct. 24, 1982, sec. 11, at 1.

(140) Duffy, supra note 96, at 96.

(141) N.Y. Times, Oct. 24, 1982, sec. 11, at 1.

(142) N.Y. Times, Nov. 7, 1982, at 53, col. 1. The vote was 990,161 against and 627,088 in favor of the amendment. Id.

(143) N.Y. Times, Nov. 7, 1982, at 53, col. 1.

(144) Id.

(145) Telephone interview with Joann Cubberley, New Jersey Tidelands Resource Council (June 7, 1984).

(146) Id.

(147) See, e.g., N.Y. Times, Nov. 7, 1982, at 53, col. 1.

(148) Dickinson I, supra note 51, 454 A.2d at 504. See also Dickinson II, supra note 57, 469 A.2d at 5 n.3.

(149) Dickinson I, supra note 51, 454 A.2d at 504.

(150) Telephone interview with Joann Cubberley, supra note 145.

(151) N.J. Stat. Ann. sec. 13: 1B-13 (West Supp. 1984-1985).

(152) Telephone interview with Joann Cubberley, supra note 145. In order to give approval of a grant or lease application under N.J. Stat. Ann. sec. 13: 1B-13.9 (West 1979), the Tidelands Resource Council must be satisfied that the grant or lease is in the public interest, including in its calculations the environmental impact of the proposed use. Id. Since this statute was part of the meadowlands enactments, it is arguable that it does not apply to nonmeadowlands. See Dickinson II, supra note 57, 469 A.2d at 6; LeCompte v. State, 128 N.J. Super. 552, 320 A.2d 876, 881 (1974). If it does not, the proper standard of review for riparian lands which are not meadowlands would be an earlier statute which is still in effect. N.J. Stat. Ann. sec. 12: 3-10 (West 1979) only requires the Council to consider the effect of the action on navigation. Id. The Tidelands Resource Council apparently is the relevant granting authority for the latter statute, as well. See P. L. 1919, ch. 233, sec. 3, p. 568, as modified by P. L. 1945, ch. 22, sec. 29, as repealed by P. L. 1979, ch. 386, sec. 4. The reader is referred by N.J. Stat. Ann. sec. 13: 1A-29 (West Supp. 1983-84) to id. at sec. 13: 1B-13 (West Supp 1984-1985), where reference is made to the Tidelands Resource Council.

(153) Telephone interview with Joann Cubberley, supra note 145. N.J. Stat. Ann. sec. 13: 1B-13.9 (West 1979) directs the Tidelands Resource Council, in fixing the price to be charged for a lease or conveyance of lands owned by the state, to take into consideration "the actions of a claimant under color of title who in good faith made improvements or paid taxes, or both, on the lands in question." Id. Although this statute arguably applies only to meadowlands, and not to all tidelands, Dickinson II, supra note 57, 469 A.2d at 6; LeCompte v. State, 128 N.J. Super. 552, 320 A.2d 876, 881 (1974), it seems to be the guide currently used by the Council. This is logical since the older statutory directive concerning the setting of the consideration paid for tidelands is less specific ("such compensation...as shall be determined by the board") and does not contemplate the possibility of good faith landholders of filled tidelands attempting to clear tideland title. See N.J. Stat. Ann. sec. 12: 3-10 (West 1979)

(154) Telephone interview with Joann Cubberley, supra note 145.

(155) N.Y. Times, Oct. 23, 1982, at 29, col. 5; Wall St. J., OCt. 11, 1982, at 23, 30.

(156) Dickinson II, supra note 57, 469 A.2d at 13 n.14

(157) Telephone interview with Joann Cubberley, supra note 145.

(158) N.J. Const. of 1947 art VIII, sec. iv, para. 2.

(159) See N.Y. Times, Oct. 24, 1982, sec. 11, at 1, col. 5. As of 1982, the interest from the Fund comprised only a few million of the two billion dollars New Jersey spent annually on the school aid. Id.

(160) Supra notes 101-107 and 117-126 and accompanying text.

(161) If the property had been tidelands within the past forty years, under the 1981 constitutional amendment any state claim to the land would not be precluded until forty years after the land attained its nontidal state. See N.J. Const. of 1947 art. VII, sec. 5, para. 1, as amended Nov. 3, 1981; supra note 104.

(162) Supra notes 147-154 and accompanying text.

(163) Supra notes 45-47 and accompanying text.

(164) Ward Sand and Materials Co. v. Palmer, 51 N.J. 51, 237 A.2d 619, 624 (1968). Where tidelands had been reclaimed under the authority of the Wharf Act of 1851, but subsequently were reinundated for over fifty years, the reasonable time allowed a private owner to reexclude the tide had long since lapsed. Id. Title to the land vested in the state. Id.

(165) See supra note 49 and accompanying text.

(166) See University of Maine, supra note 18, at 188.

(167) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 633, 393 N.E.2d 356 (1979). The companies received "absolute property in the land within the limits of the charter," as well as "full dominion over all the ports, rivers, creeks, and havens, and in as full and ample a manner as they were before held by the Crown of England." Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 180, 182 (1822).

(168) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 633-34, 393 N.E.2d 356 (1979). See also Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 65-66 (1851).

(169) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 634, 393 N.E.2d 356 (1979).

(170) Id.; Opinion of the Justices, 437 A.2d 597, 605 (Me. 1981).

(171) See supra note 34.

(172) See supra note 34 and accompanying text.

(173) Colony Ordinance of 1641-47, ch. LXIII, sec. 2, Ancient Charters and Laws of the Colony and Province of Massachusetts Bay 148 (1814 ed.) (cited in University of Maine supra note 18, at 189) (hereinafter cited as Colony Ordinance of 1641-47). Section 3 of the ordinance provides:

> It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further:
>
> Provided, that such proprieter shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

Id. See also Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 635-36, 393 N.E.2d 356 (1979); Opinion of the Justices, 437 A.2d 597, 605 (Me. 1981).

(174) See Colony Ordinance of 1641-47, supra note 173, at ch. LXIII, secs. 2-3. Section 2 provides:

> Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town, or the general court, have otherwise appropriated them:
>
> Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

Id. See also Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561, 566 (1974); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 67-79 (1851).

(175) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 637, 393 N.E.2d 356 (1979).

(176) See Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1851).

(177) Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 74-75 (1851).

(178) See Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 76-77 (1851).

(179) Id. Although the Colonial Ordinance was enacted in the Massachusetts Bay Colony, it was adopted by common law throughout the rest of the Province of Massachusetts. Id. at 76.

(180) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 640, 393 N.E.2d 356 (1979).

(181) Id. at 637-38 (and statutes cited therein); Bradford v. McQuesten, 18 Mass. 80, 82, 64 N.E. 688, 689 (1902).

(182) See Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 72 (1851).

(183) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 640, 393 N.E.2d 356 (1979).

(184) Id. (citing St. 1866, ch. 149, sec. 4). (current version at Mass. Ann. Laws ch. 91, sec. 20 (Michie/Law Co-op. 1975)).

(185) St. 1859, ch. 223 (current version at Mass. Ann. Laws ch. 91, sec. 2 (Michie/Law Co-op. 1975)).

(186) Commissioner of Public Works v. Cities Serv. Oil Co., 308 Mass. 349, 32 N.E.2d 277, 281 (1941) (citing St. 1866, ch. 149, sec. 4) (current version at Mass. Ann. Laws ch. 91, sec. 21 (Michie/Law Co-op. Supp. 1984)).

(187) Mass. Ann. Laws ch. 91, sec. 21 (Michie/Law. Co-op 1975).

(188) See id., where all cases cited in the annotation deal with monetary compensation.

(189) St. 1866, ch. 149, sec. 5 (current version at Mass. Ann. Laws ch. 91, sec. 23 (Michie/Law. Co-op. 1975)).

(190) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 640, 393 N.E.2d 356 (1979); Commissioner of Public Works v. Cities Serv. Oil Co., 308 Mass. 349, 32 N.E.2d 277, 280 (1941) (both citing St. 1869, ch. 432, sec. 1) (current version at Mass. Ann. Laws ch. 91, sec. 15 (Michie/Law. Co-op Supp. 1984)).

(191) St. 1869, ch. 432, sec. 1 (current version at Mass. Ann. Laws ch. 91, sec. 15 (Michie/Law. Co-op Supp. 1984)).

(192) Commissioner of Public Works v. Cities Serv. Oil Co., 308 Mass. 349, 32 N.E.2d 277, 281 (1941) (citing St. 1874, ch. 284, sec. 1) (current version at Mass. Ann. Laws ch. 91, sec. 22 (Michie/Law. Co-op. Supp. 1984).

(193) For the definition of one hundred rod lands, see supra text following note 34.

(194) Telephone interview with Bill Lahey, Esq., Massachusetts Executive Office of Environmental Affairs (June 7, 1984).

(195) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 630, 637, 393 N.E.2d 356 (1979) (citing St. 1832, ch. 102).

(196) Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 641, 393 N.E.2d 356 (1979) (and cases cited therein).

(197) 378 Mass. 629, 393 N.E.2d 356 (1979).

(198) Id. at 646-49.

(199) Id. at 649.

(200) Id.

(201) Black's Law Dictionary 266 (5th ed. 1979).

(202) Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981).

(203) Accord id. at 1098.

(204) Id. at 1098, 1099.

(205) See id. at 1099; Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1851).

(206) See Answer of the Justices to the Senate, 415 N.E.2d 170 (Mass. 1980).

(207) Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1098 (Mass. 1981) (citing S. No. 1001). See also Opinion of the Justices to the Senate, 424 N.E.2d 1111 (Mass. 1981) (advisory opinion on similar bill, H. No. 658).

(208) Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1098 (Mass. 1981).

(209) Id. at 1102. Although the court believed that the proposal directing how instruments were to be construed was proper, it did not think it would release the Commonwealth's interest in the submerged land involved in the Boston Waterfront case. Id. at 1102. In the court's opinion the commonwealth's interest in the Boston Waterfront property stemmed not by implication from legislation, but from the legislature's failure to make a complete grant of the commonwealth's and the public's interest in the land. Id.

(210) See id. at 1110 (Liacos and Abrams, JJ., dissenting).

(211) Id. at 1102-03. The court concluded that the vestigial interest of the commonwealth could be properly eliminated. Id. at 1103.

(212) See id. at 1103.

(213) See id. at 1110 (Liacos and Abrams, JJ., dissenting).

(214) Id. at 1103-05. The majority of the court concluded this provision constitutional. Id. at 1104. The majority believed that a public trust interest of the type involved in the Boston Waterfront case could properly be considered for release in the manner described in the bill. Id.

(215) Id. at 1106-07.

(216) Act of Dec. 17, 1983, ch. 589, with emergency preamble, 1983 Mass. Adv. Legis. Serv. 139 (Law. Coop.) (relevant sections codified at Mass. Ann. Laws ch. 91, secs. 1-24 (Michie/Law Coop. Supp. 1984)).

(217) Telephone interview with Bill Lahey, Esq., supra note 194. See Mass. Ann. Laws ch. 91, sec. 18 (Michie/Law. Coop. Supp. 1984).

(218) Telephone interview with Bill Lahey, Esq., supra note 194. See St. 1956, ch. 528.

(219) Mass. Ann. Laws ch. 91, secs. 1, 18 (Michie/Law. Coop. Supp. 1984). The Department of Environmental Quality, as well as the Department of Environmental Management, are the successors of the Board of Harbor Commissioners charged with protecting the commonwealth's tidelands. See id. at sec. 1 (the end result of St. 1919, ch. 350, sec. 113, as amended by St. 1931, ch. 394, sec. 49, as amended by St. 1975, ch. 706, secs. 123, 312, as amended by St. 1983, ch. 589, sec. 20).

(220) Mass. Ann. Laws ch. 91, sec. 18 (Michie/Law. Coop. Supp. 1980).

(221) Id.

(222) Id. at sec. 1.

(223) Id.

(224) Id.

(225) Id. at secs. 14, 18. These findings relate to the development's contribution to the public interest and its compliance with other state programs. Id. at sec. 18.

(226) Id. at sec. 14.

(227) See supra notes 175-176, 196, and accompanying text.

(228) See supra notes 197-203 and accompanying text.

(229) See supra notes 190-191 and accompanying text.

(230) Id.

(231) Id.

(232) See supra note 189 and accompanying text.

(233) Telephone interview with Bill Lahey, Esq., supra note 194.

(234) Id.

(235) Id. See supra notes 219-221 and accompanying text.

(236) Telephone interview with Bill Lahey, Esq., supra note 194. For a discussion of these assessments, see supra notes 185-188 and 192 and accompanying text, as well as the statutes cited therein.

(237) University of Maine, supra note 18, at 306. The Massachusetts Legislature agreed to the separation on June 19, 1819, and the United State Congress voted to admit Maine to the Union by an enactment dated March 3, 1820. Id. at 306 and nn. 3-4. (citing Gen. Laws of Mass. 1799-1822, Acts and Laws, 1819, ch. 36, ch. 162 and 3 U.S. Stat. 544, ch. 19 (1820)).

(238) University of Maine, supra note 18, at 187.

(239) Barrows v. McDermott, 73 Me. 441, 448 (1882).

(240) State v. Wilson, 42 Me. 2, 26-27 (1856).

(241) Marshall v. Walker, 93 Me. 532, 536, 45 A. 497 (1900).

(242) State v. Wilson, 42 Me. 2, 26-27 (1856)

(243) See Colony Ordinance of 1641-47, supra note 173, at ch. LXIII, sec. 3.

(244) See Me. Rev. Stat. Ann. tit. 12, sec. 559 (2) (D) (1981). There "submerged land" is defined to include the one hundred rod lands. Id.

(245) See supra notes 19-20 and accompanying text.

(246) See University of Maine, supra note 18, at 317. This authorization would have to be given by the state legislature or its delegate. Id.

(247) Id. at 314.

(248) Opinion of the Justices, 437 A.2d 597, 598-99 (Me. 1981).

(249) Whitmore v. Brown, 102 Me. 47, 65 A. 516, 520 (1906).

(250) University of Maine, supra note 18, at 295. A fishing weir is a fixed structure constructed of posts surrounded by brush or netting which is designed to catch fish. See Me. Rev. Stat. Ann. tit. 38, sec. 1021 (1978).

(251) Whitmore v. Brown, 102 Me. 47, 65 A. 516, 520 (1906) (citing Me. Rev. St. ch. 4, secs. 96-99); University of Maine, supra note 18, at 295 and n. 249 (citing P. L. 1876, ch. 78). (current version at Me. Rev. Stat. Ann. tit. 38, sec. 1022 (1978)). See also Blaney v. Rittall, 312 A.2d 522, 528 (Me. 1973)

(252) Id.

(253) Whitmore v. Brown, 102 Me. 47, 65 A.2d 516, 520 (1906).

(254) Id.

(255) Morrison, Submerged Lands: Public or Private Ownership?, Com. Fisheries News, Aug. 1983, at 30.

(256) See infra notes 239-42 and accompanying text.

(257) See infra notes 245-46 and accompanying text.

(258) Opinion of the Justices, 437 A.2d 597, 599 (Me. 1981)

(259) Blaney v. Rittall, 312 A.2d 522, 528 (Me. 1973).

(260) Id. (citing Me. Rev. Stat. Ann. tit. 12, sec. 4701 (repealed 1975)).

(261) Me. Rev. Stat. Ann. tit. 38, sec. 472 (1978).

(262) Id. at sec. 471.

(263) Id. at sec. 474, as amended by 1983 Me. Legis. Serv. ch. 453, sec. 5.

(264) Opinion of the Justices, 437 A.2d 597, 599 (Me. 1981).

(265) Id.

(266) Id.; Morrison, supra note 255, at 30.

(267) Me. Rev. Stat. Ann. tit. 12, sec. 5013 (1981).

(268) "Submerged land" later was defined as "all land

affected by the tides seaward of the natural low watermark or 100 rods from the natural high watermark, whichever is close to natural high watermark." Me. Rev. Stat. Ann. tit. 12, sec. 559 (2) (D) (1981)

(269) "Intertidal land" later was defined as "all land affected by the tides below natural high watermark and either 100 rods seaward therefrom or the natural low watermark, whichever is closer to the natural high watermark," id. at sec. 559 (2) (B), that is, the tidal flats. See supra note 34 and accompanying text.

(270) Me. Rev. Stat. Ann. tit. 12, sec. 558 (2) (A) (1981)

(271) Id. See also Opinion of the Justices, 437 A.2d 597, 599 (Me. 1981).

(272) Me. Rev. Stat. Ann. tit. 12, sec. 558 (2) (B) (1981). The fish landing and processing operations granted no-cost easements could not occupy more than two thousand square feet of state tidelands. Id. at sec. 558 (2) (B) (3).

(273) Id. at sec. 558 (3). See also Opinion of the Justices, 437 A.2d 597, 599 (Me. 1981); Morrison, supra note 255, at 30.

(274) Me. Rev. Stat. Ann. tit. 12, sec. 559 (2) (B) (1981).

(275) Compare Me. Rev. Stat. Ann. sec. 559 (2) (B) (1981) with Colony Ordinance of 1641-47, supra note 173, at ch. LXIII, sec. 3. For the statutory definition of "intertidal land," see supra note 269.

(276) See Morrison, supra note 255, at 30.

(277) Id.

(278) See Me. Rev. Stat. Ann. tit. 12, sec. 559 (1981).

(279) Id. at sec. 559 (3).

(280) Opinion of the Justices, 437 A.2d 597, 605 and n.4 (Me. 1981). See Me. Rev. Stat. Ann. tit. 12, sec. 559 (7) (1981).

(281) Opinion of the Justices, 437 A.2d 597, 606 (Me. 1981).

(282) Me. Rev. Stat. Ann. tit. 12, sec. 559 (1) (1981).

(283) Id.

(284) See Opinion of the Justices, 437 A.2d 597 (Me. 1981). The Maine court relied heavily upon the advisory opinion of the Massachusetts Supreme Judicial Court concerning a similar bill, id. at 607-611, which is discused supra notes 207-215 and accompanying text.

(285) Opinion of the Justices, 437 A.2d 597, 607, 609 (Me. 1981).

(286) Id. at 608.

(287) Id. at 607.

(288) Id.

(289) Id.

(290) Id. at 607-08.

(291) Id. at 608.

(292) Id.

(293) Id.

(294) Id. at 608-09.

(295) Morrison, supra note 255, at 30.

(296) Me. Rev. Stat. Ann. tit. 12, sec. 559 (1981). See supra notes 279-80 and accompanying text.

(297) Me. Rev. Stat. Ann. tit. 12, sec. 558 (1981). See supra notes 271-74 and accompanying text. Amendments to the permitting statute for wharves and weirs, which were passed in 1975, specifically provided that any license for such a structure "does not confer any right, title or interest in submerged or intertidal lands owned by the State." P. L. 1975, ch. 287, sec. 2 (codified at Me. Rev. Stat. Ann. tit. 38, sec. 1022 (1978).

(298) See Me. Rev. Stat. Ann. tit. 12, sec. 558 (1978).

(299) See Morrison, supra note 255, at 30.

(300) Id.

(301) It is possible that Me. Rev. Stat. Ann. tit. 12, sec. 558 (1981) will be interpreted as a repeal of the Colonial Ordinance of 1641-47, and a reassertion of the state's interest in tidal flats not yet appropriated by riparian owners. If so, shorefront landowners will no longer be able to obtain title to the adjacent tidal flats by filling these lands.

(302) See Morrison, supra note 255, at 30.

(303) See supra notes 170-74 and accompanying text.

(304) See supra notes 179 and 239 and accompanying text.

(305) See supra notes 39-44 and accompanying text.

(306) See supra note 169 and accompanying text.

(307) See supra notes 170-73 and 239-40 and accompanying text.

(308) See supra notes 40-41 and accompanying text.

(309) See supra notes 45-47 and accompanying text.

(310) See supra notes 174, 177 and 240-41 and accompanying text.

(311) See supra notes 175-76 and 242 and accompanying text.

(312) See supra note 48 and accompanying text.

(313) See supra text following notes 230 and 300.

(314) See supra Commonwealth v. Alger, 61 Mass. (Cush. 7) 53, 72 (1851).

(315) See supra note 49 and accompanying text.

(316) See supra note 184 and accompanying text.

(317) See supra notes 251-254 and accompanying text.

(318) See supra note 50 and accompanying text.

(319) See supra notes 186-88 and 192 and accompanying text.

(320) See supra notes 49-50 and accompanying text.

(321) See supra notes 45-46 and 49 and accompanying text.

(322) See supra note 184 and accompanying text.

(323) See supra notes 190-91 and accompanying text.

(324) See supra notes 186-88 and accompanying text.

(325) See supra note 192 and accompanying text.

(326) See supra notes 251-52 and accompanying text.

(327) See supra notes 270-73 and accompanying text.

(328) See supra notes 259-60 and accompanying text.

(329) See supra notes 49, 184, 189, 217-26, 251-54 and 259-63 and accompanying text.

(330) See supra notes 163-65, 229, 231-32, 297 and 301 and accompanying text.

(331) See supra notes 61-64 and accompanying text.

(332) See supra notes 70-76 and accompanying text.

(333) See supra note 93 and accompanying text.

(334) See supra notes 103-07 and 117 and accompanying text.

(335) See supra notes 120-21 and accompanying text.

(336) See supra notes 122-26 and accompanying text.

(337) See supra notes 150-54 and accompanying text.

(338) See supra notes 211-12 and accompanying text.

(339) See supra notes 216-17 and accompanying text.

(340) See supra note 236 and accompanying text.

(341) See supra note 279 and accompanying text.

(342) See supra notes 66-67, 99-101, 205-07 and 279-83 and accompanying text.

(343) See supra notes 134, 147 and 283 and accompanying text.

(344) See supra notes 67-79, 117-18, 206-07, 216, 267-70 and 278-80 and accompanying text.

(345) See supra notes 99-100 and 293 and accompanying text.

(346) See supra notes 19-20 and accompanying text.

(347) See The Water's Edge, supra note 1, at 6-16.

(348) See generally R. Powell and P. Rohan, Powell on Real Property secs. 1012-1026 (abr. 1968).

(349) See, e.g., id. at sec. 1020; Porro, Meadowlands Owner's Dilemma, pt. 1 supra note 66, at 15-16.

(350) See, e.g., Sax, supra note 76 at 478-89.

(351) See supra notes 56-57 and accompanying text.

(352) See supra notes 70-76 and accompanying text.

(353) See supra notes 79-83, 93 and 120-23 and accompanying text.

(354) See supra notes 147-52 and accompanying text.

(355) See supra note 146 and accompanying text.

(356) See supra note 234 and accompanying text.

(357) See supra note 235 and accompanying text.

(358) Opinion of the Justices, 437 A.2d 597, 608 (Me. 1981).

(359) Id. at 607.

(360) See supra notes 113 and 295 and accompanying text.

(361) See supra notes 163-65, 229, 231-32, 297 and 301 and accompanying text.

(362) See supra notes 147-54 and 161-62 and accompanying text.

(363) See supra note 112 and accompanying text.

(364) In contrast, New Jersey's compensation rate apparently has been administratively set. See supra notes 150-54 and accompanying text.

(365) In New Jersey, it is surprising that there are so few challenges to state tidelands claims, considering the probability of success in such a proceeding. See supra notes 148-49 and accompanying text. The only apparent explanation for the lack of claims contests is the burdensome nature of the appeal, since no appeals process is provided other than the standard quiet title suit. See id.

(366) See supra text accompanying notes 334-41.

(367) See, e.g., supra notes 99-100 and 293 and accompanying text.

(368) See Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1096, 1109 app.A (Mass. 1981); Opinion of the Justices, 437 A.2d 597, 599 (Me. 1981).

(369) See supra notes 285-94 and accompanying text.

(370) See supra notes 147-54 and 161-62 and accompanying text.

(371) See supra notes 117-18 and accompanying text.

(372) If the landholder filled the tidelands himself, in violation of the statute, he obviously is not a "good faith" property holder. Similarly, since public awareness of the issue of illegally filled tidelands has been high during the past decade or more, any potential purchaser of recently filled tidelands should have been on notice to investigate the land's true status.

(373) See supra note 365.